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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 154.

JOHN W. BLODGETT,
Plaintiff-in-Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant-in-Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
BLOUNT RALLS,
Office & P. O. Address,
44 Wall Street,
Borough of Manhattan,
New York City.

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IN THE

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for William C. Cannon in the case of *William C. Cannon* v. *United States* now pending in the Court of Claims of the United States, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

There is now pending in the Court of Claims the case of *William C. Cannon* v. *United States*, No. E-595, wherein the undersigned appears as counsel for the claimant. The sole issue raised in such case is the constitutionality of the Federal gift tax provisions of the Revenue Act of 1924. The case was set for hearing before the Court of Claims on January 3, 1927, but on being advised that the Circuit Court of Appeals for the Sixth Circuit a few days before had asked instruc-

tions of this Honorable Court upon the constitutionality of the Federal gift tax for its guidance in the Blodgett case, the Court of Claims refused to hear the Cannon case and transferred it to the general calendar, pending the decision of this Honorable Court on the questions certified.

WHEREFORE, motion is respectfully made for permission to file the accompanying brief.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
BLOUNT RALLS,
Attorneys for William C. Cannon.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

JOHN W. BLODGETT, Plaintiff-in-Error, against CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant-in-Error.	No. 154.

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

SIRS:

PLEASE TAKE NOTICE that upon the annexed motion for leave to file brief as *amici curiae* and brief, the undersigned will move this Honorable Court at the October Term, 1927, thereof, to be held in the Capitol at the City of Washington, District of Columbia, on the 3rd day of October, 1927, at the opening of court on that day or as soon thereafter as counsel can be heard for permission to file a brief as *amici curiae* in this case.

Dated, New York, August 23, 1927.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
BLOUNT RALLS,
44 Wall Street,
Borough of Manhattan,
New York City.

To:

THE HONORABLE THE SOLICITOR GENERAL
OF THE UNITED STATES,
Department of Justice,
Washington, D. C.

MARK NORRIS, Esq.,
Attorney at Law,
Grand Rapids, Michigan.

Consent of Solicitor General to File Brief.

Department of Justice

WMS-EP

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C.

August 29, 1927.

Montgomery B. Angell, Esq.,
c/o Davis, Polk, Wardwell, Gardiner & Reed,
44 Wall Street,
New York City.

In re: *Blodgett* v. *Holden*, No. 154, *October Term, 1927.*

Dear Sir:

In reply to your letter of the 23rd instant, you are advised that this office has no objection to the filing of a brief by Mr. Davis and you as *amici curiae* in the above case.

When your brief is in final print, please send this office several copies.

Very truly yours,

(Signed) GARDINER T. LLOYD,
Acting Solicitor General.

Consent of Counsel for Plaintiff-in-Error. to File Brief.

NORRIS, MCPHERSON, HARRINGTON & WAER
Attorneys & Counsellors
1107-1111 Grand Rapids Savings Bldg.
Grand Rapids, Mich.

September 2, 1927.

Messrs. Davis, Polk, Wardwell, Gardiner & Reed,
44 Wall Street,
New York, New York.

Gentlemen:

In regard to your filing a brief as friend of the court in the case of Blodgett vs. Holden, please be advised that as counsel for plaintiff-in-error I consent to your doing so.

I thank you for the copy of the brief forwarded to me.

Yours very truly,

(Signed) MARK NORRIS.

MN:W

IN THE

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OCTOBER TERM, 1927.

JOHN W. BLODGETT,
Plaintiff in Error,

against

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant in Error.

No. 154.

BRIEF AS *AMICI CURIAE*.

The Questions Presented.

It is proposed in this brief to consider only those fundamental questions of law upon which the conclusions of this Honorable Court in reaching its decision herein must be predicated. The discussion will be limited to a consideration of the following points:

1.

The Federal gift tax imposed by Sections 319 to 324 of the Revenue Act of 1924 is a direct tax and since not apportioned is unconstitutional.

2.

Even if the gift tax is an indirect tax when applied prospectively, its retrospective application results in taxing property directly, and since not apportioned it is unconstitutional as applied retroactively.

The Statute.

Title III, Part II of the Revenue Act of 1924, in Section 319 thereof, imposes a graduated tax ranging from 1% on taxable gifts of less than $50,000 to 40% on taxable gifts exceeding $10,000,000, as follows:

> "For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a non-resident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly."

It is provided in Section 320 that:

> "If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift."

And further:

> "Where property is sold or exchanged for less than a fair consideration in money or moneys worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by Section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

Section 321 makes provision for certain specific deductions in the case (a) of a resident, and (b) of a non-resident.

Section 322 provides that in case the donor of a gift subject to tax under Section 319 dies and the amount of such gift is properly included in the decedent's gross estate, the amount of gift tax shall be credited against and applied as a reduction of the estate tax.

Section 323 and Section 324 are as follows:

> SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess

of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange.

SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301.

From these provisions it will be apparent that the Act imposes—

(1) A general tax on *all* gifts of *any* property *wherever situated*, and that whether the gift is made *directly* or *indirectly*,

(2) The tax is a graduated tax based on the value of the property given,

(3) The tax is imposed on the donor and is applicable to *any* person "who within the year 1924 or any calendar year thereafter" makes *any* gift in excess of the deductions allowed, and

(4) The tax is levied against resident donors regardless of where the property is located, i. e., whether within or without the United States, and against non-resident donors as to any property located in the United States at the time of the gift.

What could possibly be broader than these provisions of law? Every conceivable kind of transfer falls within its terms. The tax is not imposed on a limited class of transfers,

but is levied generally on *all* transfers of *any kind or variety* of property, wheresoever made, the sole limitation being that it applies only to transfers by way of gift.

It should be remembered that although the present Act allows certain exemptions, such as a specific credit of $50,000 and a deduction for charitable gifts, the constitutionality of the tax as a gift tax is unaffected by these provisions. If it is constitutional to tax a gift in excess of $50,000, it is equally constitutional to tax a gift of $10; and if it is constitutional to tax a gift to a stranger, it is equally constitutional to tax a gift to a charitable or religious institution.

SYNOPSIS OF ARGUMENT.

I.

The powers of Congress to tax and the limitations imposed thereon are set forth with particularity in the Constitution.

II.

The gift tax is a direct tax and since not apportioned is unconstitutional.

(1)

THE DISTINCTION BETWEEN A DIRECT TAX AND AN INDIRECT OR EXCISE TAX IS FUNDAMENTAL. A DIRECT TAX IS ONE LEVIED ON THE *GENERAL OWNERSHIP* OF PROPERTY; AN INDIRECT TAX IS ONE ON THE EXERCISE OF SOME *PARTICULAR PRIVILEGE* OR VOCATION, OR THE ENJOYMENT OF SOME *SPECIAL USE*.

(2)

A TAX UPON ANY ESSENTIAL INCIDENT OF OWNERSHIP IS A TAX UPON THE OWNERSHIP OF PROPERTY, AND SO A DIRECT TAX.

(3)

THE NATURAL AND UNIVERSALLY RECOGNIZED RIGHT TO RELINQUISH THE OWNERSHIP OF PROPERTY BY GIFT IS AN ESSENTIAL ATTRIBUTE OF PROPERTY AND INSEPARABLE FROM OWNERSHIP.

(4)

THE FACT THAT THE ACT PURPORTS TO TAX NOT THE PROPERTY GIVEN BUT THE TRANSFER OF THE PROPERTY DOES NOT THE LESS MAKE THE TAX A DIRECT TAX.

(5)

A GIFT TAX IS NOVEL TO ENGLISH AND AMERICAN JURISPRUDENCE. IT WAS FOR THE FIRST TIME MADE A PART OF THE FISCAL SYSTEM OF ANY NATION IN 1924. IT WAS ENTIRELY UNKNOWN TO LEGISLATORS OR ECONOMISTS AT THE TIME THE CONSTITUTION WAS ADOPTED.

III.

Even if the gift tax is an indirect tax when applied prospectively, its retroactive application results in taxing property directly, and since not apportioned it is unconstitutional as applied retroactively.

IV.

Conclusion.

ARGUMENT.

I.

The powers of Congress to tax and the limitations imposed thereon are set forth with particularity in the Constitution.

The taxing powers granted to Congress and the extent and limitations thereof are set forth in the Constitution of the United States in no uncertain terms. These are:

Article I, Section 8, Clause 1:

> "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

Article I, Section 2, Clause 3:

> "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other persons."

Article I, Section 9, Clause 4:

> "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

Article I, Section 9, Clause 5:

> "No Tax or Duty shall be laid on Articles exported from any State."

The foregoing requirements are categorical and permit of no modification. It lies within the scope of congressional

activity to impose direct taxes and to lay and collect imposts and excises. Direct taxes must, however, be apportioned in accordance with the census; indirect or excise taxes must be uniform throughout the United States; no tax or duty whatsoever may be laid upon articles exported from any state. The requirement that direct taxes shall be apportioned appears twice, once in the affirmative and once in the negative form. The emphasis given by this repetition is perhaps unique in the entire instrument.

II.

The gift tax is a direct tax and since not apportioned is unconstitutional.

(1)

THE DISTINCTION BETWEEN A DIRECT TAX AND AN INDIRECT OR EXCISE TAX IS FUNDAMENTAL. A DIRECT TAX IS ONE LEVIED ON THE *GENERAL OWNERSHIP* OF PROPERTY; AN INDIRECT TAX IS ONE ON THE EXERCISE OF SOME *PARTICULAR PRIVILEGE* OR VOCATION, OR THE ENJOYMENT OF SOME *SPECIAL USE*.

The distinction between a direct tax and an indirect or excise tax is fundamental in Constitutional law. However difficult the task in any given case may be, the Courts must recognize and enforce the distinction, for, as Mr. Justice Peckham put it in *Nicol* v. *Ames*, 173 U. S. 509, 515, "The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States."

In the beginning the line of demarkation was very indistinct. Alexander Hamilton complained that "It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution." But gradually, by succeeding decisions of the Supreme Court, a line has become worn, which while perhaps not susceptible of easy ap-

plication, serves as a clear indication of the difference in classification. The rule may be expressed thus: A tax on the person or on his property *by reason of general ownership* is a direct tax; a tax on the exercise of some *particular privilege* or vocation, or the enjoyment of some *special use* of the property in an indirect tax.

The legal definitions, while not as helpful as the decided cases, indicate the fundamental difference between the two classes of taxes and are worth some attention. In *Eisner* v. *Macomber*, 252 U. S. 189, after asserting that Congress had power to tax shareholders upon their property interests in shares of corporations, the Supreme Court continued (p. 217):

> "But that this would be taxation of property because of ownership, and hence would require apportionment • • • is settled beyond peradventure by previous decisions of this Court."

Again in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, the Court said (p. 294):

> "To levy a tax by reason of ownership of property is to tax the property."

And in *Knowlton* v. *Moore*, 178 U. S. 41, Mr. Justice White, who vehemently dissented in the two *Pollock* v. *Farmers' Loan & Trust Co.* cases, 157 U. S. 429 and 158 U. S. 601, conceded that taxes "which are the essential equivalent of a tax on property generally, real or personal, solely because of its ownership" are direct taxes. Only as recently as 1921 has the Supreme Court of Kentucky given voice to this rule when in *Craig* v. *Taylor & Sons*, 192 Ky. 36, it was said (p. 39):

> "The mere right to own and hold property cannot be made the subject of excises, since the levying of a tax by reason of ownership of property is to tax the property."

Again, the Supreme Court of Mississippi has said in *Thompson* v. *Kreutzer*, (Miss.) 72 So. 891:

> "No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership, which is not also a tax on property."

On the other hand, Mr. Chief Justice Fuller's definition of an excise tax in *Thomas* v. *United States*, 192 U. S. 363, 370, is fairly comprehensive:

> "There is no occasion to attempt to confine the words duties imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

But the actual decisions in the cases themselves more clearly indicate the line of demarkation. On the one hand a poll or capitation tax and a tax on land are direct taxes. *Hylton* v. *United States*, 3 Dall. 171; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601; *Brushaber* v. *Union Pac. R. R. Co.*, 240 U. S. 1. So is a tax on income derived from real or personal property (*Pollock* v. *Farmers' Loan & Trust Co.*, supra, *Brushaber* v. *Union Pac. R. R. Co.*, supra), a tax on the right to take possession of whiskey from a bonded warehouse (*Dawson* v. *Kentucky Distilleries Co.*, (255 U. S. 288), a tax on a stock dividend (*Eisner* v. *Macomber*, 252 U. S. 189), a tax on the extraction of turpentine from trees (*Thompson* v. *McLeod*, 112 Miss. 383, 73 So. 193). In every instance the tax in question was imposed solely by reason of the *general ownership* of the property.

Where, however, the tax is not upon the *general ownership* of property but upon the exercise of some *particular privilege* or *special use* to which the property is put, then the tax is an indirect or excise tax. For instance, a tax upon carriages kept for private use was held to be an excise tax. *Hylton* v. *United States*, 3 Dall. 171. So also was a tax upon the priv-

ilege of issuing bank notes (*Veazie Bank* v. *Fenno*, 8 Wall. 533), a stamp tax on the sale of commodities on boards of trade and exchanges (*Nicol* v. *Ames*, 173 U. S. 409), death duties on the succession, inheritance and transfer of property at death (*United States* v. *Perkins*, 163 U. S. 625; *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust Co.* v. *Eisner*, 256 U. S. 345), a tax on tobacco manufactured for consumption imposed at a period intermediate the commencement of manufacture and the final consumption of the article (*Patton* v. *Brady*, 184 U. S. 608), a tax upon the sales of shares of stock in corporations (*Thomas* v. *United States*, 192 U. S. 363), a tax on the carrying on of a business in corporate form (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107), a tax on colored oleomargarin (*McCray* v. *United States*, 195 U. S. 27), a tax upon the use of foreign built yachts (*Billings* v. *United States*, 232 U. S. 261). In every instance the tax was upon some peculiar privilege enjoyed or special use undertaken.

In *Knowlton* v. *Moore*, *supra*, the court said (p. 81) that a tax on legacies was an excise tax "because of the particular occasion which gives rise to its levy". In the *Patton* case, *supra*, involving a tax on the manufacture and sale of tobacco, the tax was upheld as an indirect tax because it was a tax (p. 619) "on certain kinds of property, having reference to their origin and their intended use". In the *Thomas* case, *supra*, the tax on the sale of shares of stock represented by certificates was held an excise tax on the ground that (p. 371) "the sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates". In the *Stone Tracy Company* case, *supra*, where a tax on carrying on business in a corporate capacity was upheld as an excise tax, the Court said (p. 151):

> "The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from cor-

> porate or quasi corporate organization; or, when applied to insurance companies, for doing the business of such companies. * * * If business is not done in the manner described in the statute, no tax is payable."

And again (p. 150):

> "In the present case, the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed * * *."

And again (p. 151):

> "The difference between the acts [i. e., receiving income and doing business] is not merely nominal, but rests upon substantial differences between the *mere ownership of property* and the actual doing of business *in a certain way*." (Italics ours.)

Perhaps the best statement of the distinction between direct and indirect taxes is that given by Mr. Justice Peckham in *Nicol* v. *Ames*, *supra*, where he said (p. 521):

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. *It takes no notice of any kind of privilege or facility, and the fact of sale is alone regarded.*" (Italics ours.)

Thus, in the *Billings* case, *supra*, where a tax on the use of foreign built yachts was held an excise tax, what the statute taxed was not the *ownership* of the yacht, but the *particular use* of the yacht *for pleasure purposes*, that is, the tax was imposed upon the *use* of the yacht *as a yacht*. Such a tax is quite different from a general tax on *all* income from property, as in the *Pollock* cases, or a tax on obtaining *possession* of property, as in the *Kentucky Distilleries* case, or it is submitted, a general tax on the *disposal* of any and every kind of property, as in the instant case.

From the foregoing it is apparent that a tax is on property when it is levied because of the *mere ownership* of such property. Now ownership means nothing more nor less than the *relationship* of the owner to the thing. Property has no value in the eyes of the law, except in so far as it confers advantages upon the owner. Or as Alexander Hamilton put it: "What in fact is property, but a fiction, without the beneficial use of it?" Consequently, as Mr. Justice Brandeis said in the *Kentucky Distilleries* case, *supra*, page 294, "To levy a tax by reason of ownership of property is to tax the property". This being the case, how shall we determine and define taxes which fall upon the ownership of property, as distinguished from excise taxes upon some particular privilege or special use to which that property is put?

(2)

A TAX UPON ANY ESSENTIAL INCIDENT OF OWNERSHIP IS A TAX UPON THE OWNERSHIP OF PROPERTY, AND SO A DIRECT TAX.

Both on principle and authority, a tax which is levied upon one or more of the *essential incidents* of ownership is a tax upon ownership and so a direct tax. It is this principle which the Supreme Court established beyond peradventure in the two *Pollock* cases, and if there is anything left of the decision in those cases, this principle must be taken as fundamental.

Prior to the decision in the two *Pollock* cases it had generally been considered that only a poll or capitation tax or a "tax on land", as the expression went, were direct taxes. This limitation the Supreme Court refused to accept, but, sweeping aside with some impatience the loose expression "a tax on land", it showed by clear analysis that it is impossible to conceive of taxing a thing except by taxing one or all of the *essential incidents of the ownership* of that thing, and that one of those essential incidents was the right to receive

the income derived from the property owned. Obviously, that which primarily gives value to property is the rents and profits derived therefrom. "We find it impossible," said the Court in the course of its opinion on rehearing (158 U. S. 601, 628), "to hold that a fundamental requisition [i. e., the requirement that direct taxes be apportioned], deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself."

Property in the abstract is meaningless. Property is in reality nothing more nor less than the sum of those *fundamental incidents* which the law has always recognized as attaching to the owner of property. *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308, 320. In his Critique of Pure Reason Emanuel Kant endeavored to distinguish between the "ding an sich" or the thing in itself, and its external attributes, such as shape, color, etc. He sought to show that there is something beyond and in addition to the physical attributes of an object. This may be well enough for philosophers and metaphysicians, but such a conception is quite foreign to our daily life and certainly has no place in the theory of the law. Those rights which attach to what we call ownership themselves *are* ownership in legal cognizance. Take, for example, a chair. The chair is of value to its owner not because of the "thing in itself", but because of the fact that it serves a particular use, or is pleasing to the eye, or may be sold and its value realized in another thing more desirable. Beyond what these external qualities may give, the owner of the chair has nothing.

The Supreme Court of Michigan, in *Grand Rapids Booming Co.* v. *Jarvis*, *supra*, p. 320, expressed it in this way:

> "Of what does property practically consist but of the incidents which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to the lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that

> dreams are made of?' Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practically valuable to him? • • • Property does not consist merely of the right to the ultimate particles of matter of which it may be composed, • • • but of those properties of matter which can be rendered manifest to our senses and made to contribute to our wants or our enjoyments."

What we call "property" is that which attaches to ownership and gives it value. It is nothing more nor less than the opportunity secured to the owner freely to enjoy undisturbed and without restraint, those fundamental qualities of general ownership which the law has recognized from its early beginnings, namely, possession, use, the receipt of rents and profits (or income) and the power of disposal. A tax upon any or all of these fundamental attributes of property is a tax upon the property itself, and consequently a direct tax within the meaning of the Constitution.

Since the decision in the *Pollock* case this doctrine has been accepted and applied in other cases. In the *Kentucky Distilleries* case, *supra*, a tax upon the owners' act in taking possession of his own property was held to be a tax on property. Justice Brandeis in the course of his opinion quoted with approval from the decision of the Court below (p. 294):

> "The thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i. e., consumption, sale or keeping for future consumption or sale. • • • The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value".

In the course of his opinion, Justice Brandeis cited two Mississippi cases which are particularly pertinent. In

Thompson v. *Kreutzer*, 112 Miss. 165, 72 So. 891, the Supreme Court of Mississippi said (p. 167):

> "A tax on a thing is a tax on all its essential attributes; and a tax on an essential attribute of a thing is a tax on the thing itself • • • No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership, which is not also a tax on property."

In the second case, *Thompson* v. *McLeod*, 112 Miss. 383, 73 So. 193, it was held that a statute imposing a tax upon the extraction of turpentine from any trees in the state was a property tax. In the course of its opinion the Court said (p. 388):

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to pull the ripe pecans from the pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

In view of these expressions of judicial opinion, it is not surprising to find that the disposal of property by sale is likewise considered one of the fundamental incidents of ownership, and a tax on the sale is a tax on the property. In distinguishing the tax under consideration in *Nicol* v. *Ames*, *supra*, from a general tax on all sales, Justice Peckham said in part (p. 521):

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon *every* sale made in *any place*. The latter tax is really and practically *upon property*. It takes no notice of any kind of privilege or facility, and *the fact of a sale is alone regarded*." (Italics ours.)

No less a jurist than Chief Justice Marshall has recognized the same principle. In *Brown* v. *Maryland*, 12 Wheat. 419, the Chief Justice said (p. 444):

> "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

Thus, one of the essential incidents of ownership is the enjoyment of the rents and profits (*Pollock* v. *Farmers' Loan & Trust Co., supra*); another is the right of possession (*Kentucky Distilleries* case, *supra*); a third is the right of free disposition by sale (*Nicol* v. *Ames, supra*). A tax on any one of these essential incidents of ownership is a tax on the property and so a direct tax.

(3)

THE NATURAL AND UNIVERSALLY RECOGNIZED RIGHT TO RELINQUISH THE OWNERSHIP OF PROPERTY BY GIFT IS AN ESSENTIAL ATTRIBUTE OF PROPERTY AND INSEPARABLE FROM OWNERSHIP.

The incidents of ownership are manifold, but those fundamental incidents which give to property its very meaning stand out sharply. To repeat, they are the enjoyment of possession with the right of user, the receipt of rents and profits or income, if any, and the power of free disposal, whether by sale, by gift, by abandonment or by destruction. These three essential incidents of ownership have their roots deep in the common law.

In Coke on Littleton, it is said, Lib. 1, Chap. 1, Sec. 1, p. 4 b:

> "If a man seized of lands in fee, by his deed granteth the profits of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartae*, the whole land itselfe doth passe; for what is the land but the profits thereof?"

And in Blackstone we find the following: (1 Wend. Blackstone's Commentaries, Chap. 1, p. 138):

> "The third absolute right inherent in every Englishman, is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."

Again in Kent's Commentaries (14th Edition), Part IV, pp. 320, 501, it is said:

> "The exclusive right of using and transfering property follows, as a natural consequence, from the perception and admission of the right itself."

And again at page 326:

> "The power of alienation of property is a necessary incident to the right of property, and was dictated by mutual convenience and mutual wants."

The Court of Appeals of New York put it in even stronger language (*Genet* v. *Hunt*, 113 N. Y. 158, 170):

> "An unrestricted power to appoint a fee in land • • • is equivalent to ownership."

And Sugden in his *Treatise on Powers*, 8th Ed. p. 314, said:

> "A general power [of alienation] is • • • tantamount to a limitation in fee."

Rutherforth in his *Institutes of Natural Law* (1799 Ch. 3, p. 53), in speaking of the ownership of things, says that no one can prevent the owner

> "from disposing of them as he pleases, so that property • • • contains not only a right to use those things, but a right to dispose of them either by exchanging them for other things, or by giving them away to any person, without any valuable consideration in return, or even throwing them away."

In *Buchanan* v. *Warley*, 245 U. S. 60, 74, the Supreme Court of the United States said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."

Property, said the Supreme Court of Ohio, "in a strict legal sense • • • consists in the right to • • • use, enjoyment and disposition" (*Todd* v. *Wick Bros.*, 36 Ohio State 370, 385). "The absolute right of private property consists in the free use, enjoyment, and disposal of all one's acquisitions. • • • The right of property includes the right to dispose of it according to the will of the owner" (*Board of Commissioners* v. *Rocky Mt. News Printing Co.*, 61 Pac. 494, 496). "Property does not consist merely of the title and possession. It includes the right • • • to sell and transfer it" (*Kuhn* v. *Common Council*, 70 Mich. 534).

Perhaps the best statement of the right is found in *Wynehamer* v. *The People*, 13 N. Y. 378, 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Com., 138): 'The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Com., 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' By another author, property is defined as an 'exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or giving them away to any other person without consideration, or even throwing them away.' • • • These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its at-

tributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made."

It cannot be denied that the right to transfer property by sale for a consideration is one of the fundamental incidents of ownership. Without it, property would have no value. Is the natural and universally recognized right to transfer by gift any the less an essential incident of ownership? No valid distinction can be made between these kinds of transfer. As Kent said in his commentaries, the power of alienation is one of the inherent rights of property. That power is not dependent upon whether it is exercised for a consideration or by way of gift. The law is not interested in the motive in the making of a transfer. It merely insists that the right to dispose, in whatever manner the owner may desire, is a fundamental incident to the ownership of property. The deprivation of that right is as serious in the eyes of the law as the deprivation of the enjoyment of the rents and profits. A tax on the disposition by gift or abandonment is a tax upon the property itself.

This must needs be the case. Value in the eyes of the law is not necessarily money value. Value in the eyes of the law is that quality which makes property desirable. Property is just as much desirable on account of the inherent right of giving it away as of disposing of it by sale for a consideration. One man may find value in his accumulated earnings on account of the pleasure and enjoyment in giving them to his neighbor, or to charity, or to his children, while another man finds it in selling such property at what we commonly call a profit.

Judge Raymond, in his opinion below, holding the gift tax constitutional, admits that a tax upon such of the incidents of ownership as the rights to possess, sell, pledge, keep or enjoy is a tax upon one of the fundamental incidents of property and so is a direct tax, but denies that a tax on the dis-

posal of property by way of gift is a direct tax. He undertakes to sustain this distinction in part on the ground that a tax on a gift does not impose a burden on the value of property as does a tax on the disposal by sale for a consideration. We submit that in this Judge Raymond has taken much too sordid a view of the law. In a legal sense, the right to dispose of property by gift is as valuable to the owner as the right to the rents and profits, or the right to realize gain on a sale. The law does not measure the owner's right in terms of money. It respects the value attaching to the right of disposal whatever form that disposal may take, whether that of a sale for profit, or of a gift, or through destruction.

In the *McLeod* case, *supra*, a statute taxing the extraction of turpentine from trees was held a tax on property. Can it be that the tax in question, although a direct tax in the event the turpentine was sold, is an excise tax when the turpentine is extracted and delivered by way of gift to a neighbor? If a tax is direct when laid on the plucking of one's own grapes from a vineyard, is it an indirect tax when such plucking is followed by a gift of the grapes to a neighbor? If the ripe fruit of one's trees were pulled and given to a weary traveller, would the tax on such an act be an excise tax as a mere privilege, and not a direct tax on the orchard?

The Circuit Court of Appeals for the Second Circuit reversed the decision of Judge Augustus Hand in the District Court in the case of *McNeir* v. *Anderson*, 10 F. (2d) 813, and held that the gift tax was constitutional. *Anderson* v. *McNeir*, 16 F. (2d) 970. Judge Manton, in his opinion in that case, attempts to distinguish the case of *Pollock* v. *Farmers Loan and Trust Company*, *supra*, and the case of *Dawson* v. *Kentucky Distilleries*, *supra*, on the ground that in those cases the tax fell upon incidents of ownership so essential that it would have been "impossible to use the property at all without incurring the tax". Proceeding further the learned Judge says that "it cannot be successfully contended that the right to give away property exhausts those

interests which together constitute the rights of property, so as to amount to the taking of the property".

The statement of the learned Judge taken at its face value obviously proves too much. A tax, in order to be a property tax, need not encroach upon every essential incident of ownership. In the *Pollock* case a tax which fell upon but a single incident of ownership, namely, the right to receive the rents and profits or income, was held to be a tax upon property, and therefore a direct tax. In the *Kentucky Distilleries* case a tax which fell upon another essential incident of ownership, yet but one, namely, the right to possession, was held to be a tax upon property. It is quite obvious that if an owner of property is deprived of, or grants away, a single incident of ownership, he does not thereby lose or divest himself of the other incidents, no matter how essential the incident which he has lost may be. If he grants away his right to the income, he still retains the right to possess, the right to use, the right to dispose, etc. If he makes a bailment, or a lease for years, granting away his right to possession, he still retains the other incidents of ownership.

Can it be that Judge Manton is attempting to establish a hierarchy among the *fundamental* incidents of ownership? Is the right to the income or the right to possession more important in the eyes of the law, than the right freely to dispose of one's property? The conception of such a gradation of dignity is indeed novel in the light of the authorities cited at pages 21 *et seq.* herein.

We submit that there is no valid distinction between the *Pollock* case and the *Kentucky Distilleries* case, and the instant case. The right of an owner freely to dispose of his property stands upon the same level as the right to income and the right to possession. If a tax which falls upon the right to income or upon the right to possession is a tax on general ownership, and so a direct tax, it must necessarily follow that a tax which falls upon the right of free disposition is also a tax on general ownership, and so a direct tax.

(4)

THE FACT THAT THE ACT PURPORTS TO TAX NOT THE PROPERTY GIVEN BUT THE TRANSFER OF THE PROPERTY DOES NOT THE LESS MAKE THE TAX A DIRECT TAX.

Taxation is an eminently practical matter which touches the humblest of our citizens and does not permit of fine distinctions or metaphysical subtleties. In *Nicol* v. *Ames, supra* (p. 516), it was said:

> "Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical result, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

In the recent case of *Nichols* v. *Coolidge*, decided by the Supreme Court of the United States on May 31, 1927, wherein it was held that Section 402 (c) of the Revenue Act of 1918, in so far as it requires the inclusion in gross estate of the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in enjoyment after his death, is unconstitutional, Justice McReynolds said:

> "Taxes are very real things and statutes imposing them are estimated by practical results."

For all practical purposes the tax in question, whether it may be said to attach to the *right* of transfer or to the transfer as such, is a tax imposed upon and tending to restrict by its levy the disposal of property by way of gift. In making the gift the donor is merely exercising one of his fundamental rights. He is not availing himself of any privilege conferred by Government, such as exists where the title passes from the dead to the living by inheritance or succession, or where a business is being carried on in a corporate capacity, or where

the privilege of using a certain exchange is exercised in making a sale, or where a foreign built yacht is being used for pleasure. In all such instances the tax is either upon some *particular privilege* or some more or less *restricted way of using* the particular object. Here the tax seeks out and imposes a burden directly upon one of the natural and universally recognized rights of ownership in *all* property of *any* kind or variety. The donor in making the gift is acting upon no license; he is merely exercising a right incidental to ownership. He is not holding or using his property pursuant to any Governmental sanction, nor is it necessary for him to secure consent of Government in making the gift.

But it is urged that the wording of the statute must determine to some extent the nature of the tax, and since the tax is "upon the transfer", it is a tax upon a privilege, the privilege of making the gift, likening the tax to a tax upon inheritances and successions.

The fallacy of this argument is at once obvious. In the case of inheritances and successions, a real *privilege* is availed of when the property passes on to the living. No one has the natural right to assign over his property to another by will or inheritance without the consent of the sovereign. Upon death the government might intervene and claim the property of the deceased, for the dead have no rights. If, therefore, as a matter of grace, the state permits such devolution of property, it is by way of granting a privilege, which it may withhold. The so-called "right of succession" being thus in reality a privilege conferred, a tax on succession quite properly is an excise or privilege tax. That this is the theory of the decisions is beyond question. *Knowlton* v. *Moore, supra; United States* v. *Perkins, supra; New York Trust Co.* v. *Eisner*, 265 U. S. 345; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Keeney* v. *New York*, 222 U. S. 525.

The disposal of property *inter vivos* by gift is fundamentally different. Here there is a true *right*, natural to all persons and universally recognized as such in civilized so-

cieties. It does not lie within the power of the sovereign to deny to the owner this right of disposal. The courts and the legislatures of our several states as well as the Federal Government must recognize it, and the Constitution of the United States in the 5th and 14th Amendments fully protects and enforces it. *Buchanan* v. *Warley, supra*, 74; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; 12 Corpus Juris, p. 945, §459 and cases cited. The power of disposal by way of gift is one of the essential attributes of property inseparably bound up with ownership. Congress no doubt may tax the exercise of such power of disposal, but if it does, no matter what the tax is called, it is a tax on property, and the tax must be apportioned.

For in tax matters it is the substance, not the form, which controls; how the legislature classifies the tax is immaterial. It is the nature of the tax itself which determines its constitutional classification. In considering certain refinements of argument in the *Pollock* cases, the Supreme Court said:

> "But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

Again, the same court in the course of its decision in *Kansas City Ry. Co.* v. *Botkin*, 240 U. S. 227, said (p. 235):

> "Undoubtedly, a tax may be in form a privilege tax, and, yet, in substance, may be a tax on property."

Again, in *Dawson* v. *Kentucky Distilleries Co., supra*, Justice Brandeis said (p. 292):

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents."

The argument that the gift tax is a tax not upon the property given, but upon the dissevered act of transfer seems to

underlie the decision of Judge Raymond sustaining the gift tax in the Court below, and also the decision of Judge Manton sustaining the gift tax in *Anderson* v. *McNeir, supra.* Judge Manton says, at page 973:

> "This gift tax is not imposed because of general ownership of the property, but because of the happening of an event. The transfer of the property by gift gives rise to its levy."

Judge Raymond, in his opinion, concedes that the test is whether or not the particular tax in question is imposed "because of the general ownership of property". He concedes that if the tax fell upon such of the incidents of ownership as "the rights to possess, sell, pledge, keep or enjoy", the tax would be a direct tax, and even concedes that if the tax were upon the *right* to transfer by gift it would be a direct tax. But he maintains the gift tax "is imposed only after the actual transfer", that it is not on the right to transfer but "upon the transfer after the title and ownership of the donor has ceased by reason of a gift." He then continues:

> "Unless this distinction is kept clearly in view, the mind is constantly tempted to revert to the thought that the tax is upon the *right* to transfer by gift. If it were the latter, the tax could only be imposed during actual ownership because the right to transfer terminates by the transfer itself."

He then adds, himself realizing that the attempted distinction is metaphysical to a degree:

> "This distinction is neither technical nor fanciful."

How technical and fanciful is the distinction, a cursory examination will indicate.

Judge Raymond asserts that the tax is not upon the *right* to transfer by gift but upon the transfer itself, that is, as he himself subsequently states in the course of his decision, it is

upon the *exercise* of the right to transfer. Although the act specifically imposes the tax on the donor, he says that the tax is not levied upon any of the incidents of ownership in the hands of the donor, because it is only imposed when the transfer to the donee is complete, and at that time the title and ownership of the donor has ceased.

The very statement of the proposition leaves one considerably confused. The tax is not a tax on the *right* of transfer because it attaches only after the transfer has taken place, and on the consummation of the transfer the right of transfer no longer exists. It is rather upon the *exercise* of the right. But the exercise of the right is likewise lost upon the transfer of the property. At this point the argument has become so refined that it disappears into thin air, leaving the mind in utter confusion! Whether the tax be upon the *act* of transfer or the *right* of transfer or the *exercise* of the right of transfer, as a practical matter the imposition of the tax is a burden upon and directly restricts the exercise of a very fundamental incident of ownership, namely, the very enjoyment of property through its disposal by gift to another.

The learned District Judge seeks aid and comfort for these fine spun distinctions by a reference to certain statements of Chief Justice White in *Billings* v. *U. S.*, *supra*, wherein the learned Chief Justice attempted to make a distinction between the use of property in what he called its purely passive or subjective sense, as distinguished from use in the active or objective sense, that is, in the words of the Chief Justice, "the outward and distinct exercise of a right which ownership confers but which would not necessarily be exerted by the mere fact of ownership."

Grasping this distinction as lending assistance to his own theory, Judge Raymond, after quoting at some length from the opinion, continues:

> "In the present case the subjective or passive right to make a gift of property is not taxed. It is the active or objective exercise of the right which is taxed."

With all due respect, such refinements of thought may well be left to those who are engaged in less practical questions than those of present day taxation. It is hard to conceive of a more "active" or "objective" use of property than the enjoyment of the rents and profits, the very existence of which presupposes some form of objective activity. Yet the *Pollock* cases squarely hold that a tax on such a use is a direct tax.

The distinction between the *Billings* case and the instant case, if the former needs to be distinguished, is well stated by Judge Augustus N. Hand, in *McNeir* v. *Anderson*, 10 F. (2d) 813, 814, wherein it is said:

> "Billings v. United States, 232 U. S. 261, is not in point, for the use of a yacht for pleasure was not only distinguished by the Supreme Court in the opinion of the Chief Justice from the sum total of the rights of disposition and ownership of the yacht, but it may perhaps also be said that many rights in ships have historically been treated as excisable. The laws for registry, clearance and all kinds of regulative provisions appear to place such property peculiarly within governmental control and regulation, so that the subjection of the use of it to an excise tax cannot be regarded as extraordinary."

In holding the Statute here in question unconstitutional, the learned Judge said (p. 814):

> "There is, I believe, no case where such a tax as the one now under consideration has been regarded as a tax upon an exercise or privilege. So far as I can discover, it is a form of taxation new in both America and Europe. Testamentary gifts and gifts in contemplation of death have been both in England and in the United States treated as excises and subjected to taxation upon that theory. If there is anything left of the general views of the court in Pollock v. Farmers Loan & Trust Co., 158 U. S. 601, as to the nature of so called direct taxes, a tax upon a gift not made in contemplation of death and not to take effect upon death would seem to be necessarily

a direct tax imposed upon the donor purely as the owner of property."

This is a clear statement and carries conviction. There is no need here for metaphysical distinctions or nice refinements. Judge Augustus N. Hand continues (p. 815):

> "The tax under consideration seems to have no more warrant than that before the Supreme Court in the recent case of Dawson v. Kentucky Distilleries Co., 255 U. S. 288. There the tax was described as a license tax on persons engaged in the business of owning and storing whiskey in bonded warehouses. The Supreme Court, however, held that the tax was really one on the right to take possession and remove whiskey from a bonded warehouse and was a direct tax upon property and not upon an occupation or license."

No doubt, the Government will endeavor to rely upon such cases as *Billings* v. *United States*, *supra*, *Patton* v. *Brady*, *supra*, and perhaps *Keeney* v. *New York*, *supra*. These cases, it is submitted, are not in point. They are so aptly distinguished by Judge Augustus N. Hand in *McNeir* v. *Anderson*, *supra*, (the full opinion in which is annexed hereto as an appendix) that we do not deem it necessary to do more than refer to that opinion.

Both Judge Raymond in his decision in the Court below and Judge Learned Hand in his concurring opinion in the *McNeir* case in the Circuit Court of Appeals for the Second Circuit, endeavored to fortify the position taken on the ground that the gift tax was enacted as a corollary of the estate tax and in order to insure its efficacy.

"The object of the gift tax", said Judge Raymond, "undoubtedly was to make effective the provisions of the income tax and the estate tax on their application to large estates." Later in the course of his decision he says that the gift tax "is merely corollary to the estate tax imposed in Part I of Title III of the Revenue Act of 1924 • • •. Because it was

regarded by Congress as being essential to preserve the efficacy of the estate tax it was sometimes referred to as the 'mother' of that tax", and "Its substantial object was to prevent the widespread evasion of the estate tax and high surtaxes of the income tax law." He then proceeds "Would not Congress have the right to say, in view of the history of evasion connected with the estate tax, that gifts of more than $50,000 in any one year shall be conclusively presumed to be made with an attempt to evade the estate tax and to impose an excise tax thereon?"

In passing, it should be noted that whatever the purpose of Congress in enacting the gift tax in 1924, at the present time Congress does not consider such a tax necessary for the effective administration of the Federal Estate Tax, for the gift tax was repealed by the new Revenue Act of 1926 as of January 1, 1926, while the Federal Estate Tax was continued as before.

But even assuming that the gift tax was enacted as a necessary corollary of the Federal Estate Tax, its constitutionality is not assured for that reason. Justice Holmes said in his dissenting opinion in *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 241:

> "The law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."

Be that as it may, the majority of this Court in that very case refused to sustain a taxing act which overstepped the power of the State Legislature although vigorously defended on the ground that the law was necessary in order to make effective a tax which it lay within the power of the Legislature to impose.

In the *Schlesinger* case it appeared that the Wisconsin Estate Tax Law imposed an estate tax upon gifts made in contemplation of death and the presumption of intention was made conclusive if the gift was made within six years of the

death, although there was no relation between the gift and the death in point of fact. This provision of the Wisconsin Statute this Court held unconstitutional. Contention was made that such a conclusive presumption was necessary to prevent evasion of the estate tax. This Court in considering and rejecting such a contention said in part (p. 240):

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. * * * Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

And in the more recent case of *Nichols* v. *Coolidge*, No. 88, decided May 31, 1927, Justice McReynolds said:

> "But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them."

The same reasoning is applicable here. While Congress has the power to levy a tax upon the privilege of succession, it cannot in an effort to make that tax more efficacious, reach beyond its power and impose, without apportionment, a tax which falls upon the general ownership of property. An attempt by Congress to impose a direct tax, without apportionment, cannot be justified by the assertion that the tax is being imposed in order to aid in the effective administration of an indirect tax.

In answer to those who regard the question as involving a difference in degree rather than in kind, it is enough to say that the gift tax is even more remote in its relation to the tax on the transfer of property by death than were the provisions before the Court in the *Schlesinger* case and in the *Coolidge* case.

(5)

A GIFT TAX IS NOVEL TO ENGLISH AND AMERICAN JURISPRUDENCE. IT WAS FOR THE FIRST TIME MADE A PART OF THE FISCAL SYSTEM OF ANY NATION IN 1924. IT WAS ENTIRELY UNKNOWN TO LEGISLATORS OR ECONOMISTS AT THE TIME THE CONSTITUTION WAS ADOPTED.

When in 1787 the Constitution was formally adopted by its framers, not only was a tax on gifts of property not known but it was entirely beyond conception that such a tax would ever be imposed. A tax of this nature was totally foreign to the common law. Taxes on the use of private carriages, taxes on tobacco and spirituous liquors and on occupations or privileges of many kinds had been recognized and accepted as excises for many years. But it is safe to say that neither the legislators nor the economists of those days, even in their urgent need to raise revenue for the depleted coffers of the new Government, ever thought of imposing a tax on all gifts made by its citizens. Surely this condition of affairs at the time the Constitution was passed bears directly upon its interpretation. Justice Holmes in the opinion in *New York Trust Co. v. Eisner*, 256 U. S. 345, 349, recognized that the question of taxation is largely historical. With respect to the attempted distinction between the tax on the privilege of transmitting and the tax on the privilege of receiving, he said:

> "But that matter also is disposed of by *Knowlton v. Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy'. 178 U. S. 81-83."

And then he added this peculiarly pertinent observation:

> "Upon this point a page of history is worth a volume of logic."

The instant case may well be disposed of on this simple yet fundamental principle. Not only was a gift tax never conceived at the time of the Constitution was adopted, but no one ever thought of levying such a tax until a few months prior to the passage of the Revenue Act of 1924. This fact alone is sufficient to make a court pause before holding constitutional such a novel invention. Judge Angustus Hand in deciding the *McNeir* case largely rested his decision upon this historical background, for after indicating that the tax in question clearly is a tax on property within the rule laid down in the *Pollock* case and the *Kentucky Distilleries* case, and after quoting from Justice Holmes' statement in *New York Trust Co.* v. *Eisner*, *supra*, he concluded his opinion with the following language:

> "The fact is that there is no 'page of history' or even a line of history where such a tax as this has been ever foreshadowed, and if the reasoning of *Pollock* v. *Farmers Loan & Trust Co.*, *supra*, is to stand, I cannot see how this tax can be defended, which would not seem to be an excise or license tax for the privilege of doing something, but a tax upon a necessary incident of the ownership of property, which has not been apportioned, and is therefore, forbidden by Article I, Section 2, Clause 3, of the Federal Constitution. The classification of subjects of taxation is not scientific but largely historical, and a tax upon an ordinary transfer of personal property *inter vivos* unconnected with the conduct of any business would seem to be a direct tax, if anything can be, under definitions that have been generally accepted. See *Pollock* v. *Farmers Loan & Trust Co.*, *supra*, *Nicol* v. *Ames*, 173 U. S. 509, and *Dawson* v. *Kentucky Distilleries Co.*, *supra*."

III.

If the gift tax is an indirect tax when applied prospectively, its retroactive application results in taxing property directly, and since not apportioned it is unconstitutional as applied retroactively.

In the instant case a substantial part of the gifts were made prior to the enactment of the law on June 2, 1924, and after January 1, 1924. This fact is of course unimportant if the Act imposing the tax is held unconstitutional on account of the nature of the tax. But even if the gift tax could be considered an excise tax when applied prospectively, so far as levied or attempted to be levied on gifts made before June 2, 1924, it is a direct tax as to such gifts and, since not apportioned, it is unconstitutional.

We only mention this point to raise it, and do not propose to argue it at length. The very nature of an excise or indirect tax forbids its retroactive operation without apportionment. To impose a tax upon the privilege of making a transfer after the transfer is completed leaves no choice by the taxpayer as to whether he will or will not exercise the privilege, and renders the tax unavoidable. It thereby loses one of the essential characteristics of an indirect or excise tax and in fact becomes a direct levy either upon the property itself because of ownership, or upon the person of the donor.

At the time the event occurred which subsequently occasioned the tax, no statute imposing the tax was in force. The privilege of transfer (if it was a privilege), had been exercised, and the gift completed without the exaction of a toll in the form of a tax. Now, long after the event, a tax is levied on the past act of transfer. Such a tax is the antithesis of an excise or privilege tax. It is a direct tax imposed upon the donor solely by reason of his previous ownership of the property, and since unapportioned, its levy and collection is

unconstitutional. It should be remembered that the tax in *Nichols* v. *Coolidge, supra,* was held invalid as an excise because, in the words of Justice McReynolds, "the amount is made to depend upon past lawful transactions, not testamentary in character and beyond recall."

Conclusion.

In conclusion, it is respectfully submitted that the provisions of Title III, Part II, of the Revenue Act of 1924, are unconstitutional as applied both prospectively and retrospectively.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Claimant,
Office & Post Office Address,
15 Broad Street,
Borough of Manhattan,
New York, N. Y.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
BLOUNT RALLS,
Of Counsel.

APPENDIX.

McNeir v. Anderson, Collector,*

(U. S. District Court, Southern District of New York, decided Feb. 15, 1926)

Statement of Facts.

On the 8th day of January, 1924, the plaintiff, George McNeir, hereinafter called the Donor, executed a deed of trust to the Farmers Loan & Trust Company providing that they should hold certain securities in trust to divide the same into three equal parts and to collect and to receive the income thereof and to apply the same one part to the use of the Donor's wife during the term of her natural life, another part to the use of Burrows McNeir, a son of the Donor, during the term of his natural life, and the third part to the use of Thomas Shepard McNeir, a son of the Donor during the term of his natural life. There were further trusts created for the grandchildren of the Donor, and, if the wife and the sons of the Donor should die before him leaving no issue, the trust deed provided for the payment over to the principal to the Donor, if then living, and, if not then living, one-half to Georgetown University, and the other half to those persons who would be entitled to receive the same if the Donor had died possessed of the personal property a resident of the State of New York and intestate. The securities embraced in the deed of trust were of the value of $806,400, and were transferred to the trustee on January 8, 1924. On December 15, 16 and 22, 1924, the Donor made certain other gifts to his children Burrows and Thomas Shepard McNeir, and to one William McNeir, of the value altogether of $4,300. On January 22, 1925, he executed a return for Federal Gift Tax and paid under protest a gift tax as assessed amounting to $47,

*This decision was reversed by the Circuit Court of Appeals, Second Circuit, in *Anderson* v. *McNeir*, 16 F. (2d) 970. The opinions of Judge Manton and Judge Learned Hand are discussed in the brief proper.

284. A refunding claim was rejected and thereafter this action to recover the tax was brought in this court February 7, 1925. The defendant thereafter moved to dismiss the complaint which set forth the above facts upon the ground that it did not contain facts sufficient to constitute a cause of action.

Opinion.

Augustus N. Hand, District Judge:—

The gift tax was imposed under Section 319 of the Revenue Act of 1924, which provides that:

> "For the calendar year 1924, and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated whether made directly or indirectly and upon the transfer by a non-resident by gift during such calendar year of any property situated within the United States whether made directly or indirectly * * *."

I shall not discuss whether the gift tax is unconstitutional or inapplicable because applied retroactively or because not uniform throughout the United States, or because the classification is unreasonable. If the tax be held a direct tax which must be apportioned among the several States, as I believe it must be, it will be unnecessary to consider the other objections which the plaintiff has raised.

There is, I believe, no case where such a tax as the one now under consideration has been regarded as a tax upon an excise or privilege. So far as I can discover, it is a form of taxation new in both America and Europe. Testamentary gifts and gifts in contemplation of death have been both in England and in the United States treated as excises and subjected to taxation upon that theory. If there is anything left of the general views of the court in Pollock v. Farmers Loan & Trust Company, 158 U. S. 601, as to the nature of so-called direct

taxes, the tax upon a gift not made in contemplation of death and not to take effect upon death would seem to be necessarily a direct tax imposed upon the Donor purely as the owner of property. Billings v. United States, 232 U. S. 261, is not in point, for the use of a yacht for pleasure *was* not only distinguished by the Supreme Court in the opinion of the Chief Justice from the sum total of the rights of disposition and ownership of the yacht, but it may perhaps also be said that many rights in ships have historically been treated as excisable. The laws for registry, clearance and all kinds of regulative provisions appear to place such property peculiarly within governmental control and regulation so that the subjection of the use of it to an excise tax cannot be regarded as extraordinary. The case of Patton v. Brady, 184 U. S. 608 is also not in point. There there was a tax upon tobacco manufactured for consumption imposed at a period intermediate the commencement of manufacture and the final consumption of the article. Such a tax had been applied to tobacco in England prior to the adoption of the Constitution and was held by the Supreme Court to have come within the definition of an excise tax.

The Government cites the language of Mr. Justice Lamar in Keeney v. New York, 222 U. S. 525, where a statute of New York providing for a transfer tax upon property passing by deed of a resident and intended to take effect in possession or enjoyment at or after death of the grantor is discussed. In that case the testatrix, Mrs. Keeney, four years before her death had conveyed certain property to trustees in trust to divide the net income between herself and her three children during the term of her life, and upon her death to transfer the principal to her children, or their issue. The argument was made that the case was different from one where property was transferred in contemplation of death because there was no such contemplation that a gift made inter vivos to take effect upon death was not within the transfers which could be taxed by the State as a privilege and that the tax

therefore was subject to the ordinary limitations of a property tax. Mr. Justice Lamar in upholding the tax said:

> "But, if any such distinction could be made between taxing a right and taxing a privilege, it would not avail plaintiffs in the present case. There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death, have frequently been classed with death duties, legacy and inheritance taxes. Some statutes go further than that of New York, and tax gratuitous acquisitions under marriage settlements, trust conveyances, or other instruments where the transfer of property takes effect upon the death, not merely of the grantor, but of any person whomsoever."

He went on to say that the Internal Revenue Act of 1864

> "imposed a succession tax on 'all dispositions of real estate, taking effect upon the death of any person'".

and cited the case of Scholey v. Rew, 23 Wall. 331, at p. 347. This remark about the effect of the Internal Revenue Act of 1864, and the suggestion that it extended to transfers inter vivos to take effect on the death of persons other than the grantor was made in arguendo and was unnecessary to the disposition of the Kenney case. Certainly the case of Scholey v. Rew, supra, involved no such interpretation, but whether or not such can be regarded as the proper construction of the Internal Revenue Act of 1864, there may well be a difference in classification between a tax upon a transfer of property upon the death of a person, whether he be the grantor or a third person, and the taxing of a gift inter vivos at a time when it is entirely unconnected with any devolution of property by death.

The question involved in the present case does not resemble that considered in the Keeney case for there the tax was upon the transfer of an estate at the time of the death of the settlor which had been held in trust for her life use. Here it is imposed upon a transfer inter vivos and not upon a transfer at the time of the death of anyone.

The tax under consideration seems to have no more warrant than that before the Supreme Court in the recent case of Dawson v. Kentucky Distilleries, 255 U. S. 288. There the tax was described as a license tax of persons engaged in the business of owning and storing whiskey in bonded warehouses. The Supreme Court, however, held that the tax was really one on the right to take possession and remove whiskey from a bonded warehouse and was a direct tax upon property and not upon an occupation or license. Mr. Justice Brandeis said in the opinion:

> "To levy a tax by reason of ownership of property is to tax the property. * * * It cannot be made an occupation or license tax by calling it so."

In New York Trust Company v. Eisner, 256 U. S. at p. 349, Mr. Justice Holmes mentioned the argument that the Federal Estate tax if treated as levied upon the transfer of the decedent's estate on his death would be direct, and therefore void for want of appointment and said:

> "But that matter * * * is disposed of by Knowlton v. Moore, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty of excise, because of the particular occasion which gives rise to its levy.' 178 U. S. 81 83. Upon this point a page of history is worth a volume of logic."

The fact is that there is no "page of history" or even line of history where such a tax as this has been ever foreshad

owed, and if the reasoning of Pollock v. Farmers Loan & Trust Co., supra, is to stand, I cannot see how this tax can be defended which would not seem to be an excise or license tax for the privilege of doing something, but a tax upon a necessary incident of the ownership of property which has not been apportioned and is, therefore, forbidden by Article 1, Section 2, Clause 3, of the Federal Constitution. The classification of subjects of taxation is not scientific but largely historical, and a tax upon an ordinary transfer of personal property inter vivos unconnected with the conduct of any business would seem to be a direct tax, if anything can be, under definitions that have been generally accepted. See Pollock v. Farmers' Loan & Trust Company, supra; Nicol v. Ames, 173 U. S. 509, and Dawson v. Kentucky Distilleries, supra.

The motion by the collector to dismiss the complaint is accordingly denied.

OCT 3 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 154. October Term, 1927.

JOHN W. SLODGETT,
Plaintiff-in-error,

v.

CHARLES HOLDEN, Collector of Internal Revenue,
Defendant-in-error.

ERROR TO THE DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

Brief of Amici Curiae Sur Questions Certified.

IRA JEWELL WILLIAMS,
NATHAN GLICKSMAN,
LOUIS QUARLES,
Amici curiae.

IRA JEWELL WILLIAMS, JR.,
BROWN & WILLIAMS,
GLICKSMAN & GOLD,
LEVIN, SPOONER AND QUARLES,
Of Counsel.

International, 30 Church St., Philadelphia

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IN THE

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No. 154. October Term, 1927.

JOHN W. BLODGETT,
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v.

CHARLES HOLDEN,
Collector of Internal Revenue,
Defendant-in-Error.

Error to the District Court for the Western District of Michigan.

BRIEF OF AMICI CURIAE SUR QUESTIONS CERTIFIED.

I. THE TAX IS INAPPLICABLE TO PAST GIFTS.

Section 319 of the Revenue Act of 1924, 43 Stat. 313, reads as follows: "For the year 1924 . . a tax . . . . is hereby imposed upon the transfer by a resident by gift during such calendar year of any property." The Act does not say "whether such transfer be made before or after the passage of this Act." The immediate question is whether the quoted tax applies to gifts consummated before the passage of the Act.

Statutes, and especially taxing statutes, are not to be construed retroactively if such a construction can reasonably be avoided. Thus, in *Leaellyn* v. *Frick*, 268 U. S. 238 (1925), the Government urged that the Revenue Act of 1919 included the value of insurance "under policies taken out by the decedent upon his own life," including policies taken out prior to the taxing Act. This court held that the Act did not apply to the avails of policies taken out before the passage of the Act. Mr. Justice Holmes said, at page 251,

> "Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

Again, "Laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared": *Shaub* v. *Doyle*, 258 U. S. 529, 534 (1922).

"Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them": *U. S.* v. *Heth*, 3 Cranch 399, 413 (1806).

In *Williams* v. *McCaughn*, 17 Fed (2d) 295 (1926) U. S. D. C. E. D. Pa., Dickinson, *J.*, it was held that a tax on life memberships did not apply to life memberships purchased prior to the passage of the taxing Act.

There is nothing to show an actual intent on the part of Congress to tax gifts completed before the Act

was passed. On the contrary, when Congress desired to tax transactions completed before the Act, it said so in no uncertain terms:

> "Subdivisions (b), (c), (d), (e), (f) and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."
>
> (Act of 1924, Sec. 302 (h).)

No such language is used as to gifts.

II. IF APPLIED TO PAST GIFTS THE TAX WOULD BE UNCONSTITUTIONAL.

It is beyond question that if the Act in question is to be applied retroactively, the result will be to tax the exercise of a power and right which was completed before the passage of the Act. This is exactly the same as saying, "You must pay ten dollars now because you walked across Sixteenth Street yesterday, although yesterday Sixteenth Street was free to all."

Such a tax is unconstitutional.

In *Nunnemacher* v. *Wilkinson* and *Le Febre* v. *Wilkinson*, par. 7033, Vol III, Commerce Clearing House, Unabridged Federal Tax Service, 1927, in giving judgment for the defendant, Judge Geiger said in part:

> ". . . the whole proposition comes down to the single direct statement; can an excise tax be effective other than *in future?* . . ."
>
> ". . . It seems absurd to say that the Nunnemacher and Le Feber donors should be told on June 2, 1924, that they are now subject to an

> excise upon an act wholly beyond their power to revoke, recall, or do a thing in respect of what they had previously done; and how then can you escape the idea, although it is called an excise, that it is nothing more or less than a direct tax, either against their property or against them, in respect of a completed transaction, which, if I might put it that way, at the time Congress passed the law was no longer, as to them, *excisable?*"

Again, in *Frew* v. *Bowers*, 12 F. (2d) 625 (1926), a settlor created an irrevocable trust before the enactment of the taxing statute and twelve years before his death. The United States attempted to levy a tax upon this, on the ground that it was a transfer "intended to take effect in possession or enjoyment at or after his death," because he had received the income for life. The Circuit Court of Appeals (2d Circuit) held, in an opinion by Hough, *C. J.*, that the tax so imposed was unconstitutional. The Court said, on p. 628:

> "In this case the effort is to tax in 1922 in respect of something untaxable in 1910. Cf. *Lewellyn* v. *Frick*, 268 U. S. 238, at 251. If it be said that Congress might have taxed the 1910 transfer, and therefore can tax it even in 1922, the answer is that nothing of the kind has been attempted. There is no tax now laid on the transfer of 1910, nor the property transferred. Could Congress in 1922 have laid a tax on Mr. Nash because he gave away $200,000 in 1910? *If that be assumed as possible, it is not possible that the tax so laid*, and computed on the gift, its credits and gains, *could ever be an excise on the transfer. But if the tax be laid as it actually has been, and called an excise, on the transfer of something else, the name is merely false, there is no excise, and the exaction falls into the category of unapportioned direct taxes.* We think this an effort to use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action. There

> is no real difference between disguising this direct tax under the name of a duty, and laying a tax in order generally to regulate some subject taxable, but not otherwise subject to national regulation. The real purpose is dealt with, notwithstanding the cloak. The Child Labor Cases, 259 U. S. 20, is the leading example."

In the foregoing case the Government stipulated that the writ of error to that Court might be dismissed in view of the decision of this Court in *Nichols* v. *Coolidge* (May 21st, 1927, McReynolds, *J.*), holding invalid Section 402 (c) of the Act of February 24, 1919 in so far as it requires that there shall be included in gross estate the value of properties transferred by a decedent prior to its passage.

It may be contended that the cases of *Flint* v. *Stone Tracy Company*, 220 U. S. 107 (1911) and *Billings* v. *United States*, 232 U. S. 261 (1914) are contrary to the principles just set forth. But in each case the tax was upon a *continuing* act (in the *Flint* case, upon the privilege of doing business in corporate form, and in the *Billings* case, upon the use of foreign built yachts), and was imposed annually, without pro rating as to time. *In each case also the tax as imposed operated in future*, because it applied to a state of facts continuing in existence after it was passed. Of course, the lumping charge *per annum* in those cases was unfair. But that fact is no precedent in favor of the tax now in issue, because the principle of those cases cannot be extended to uphold an "excise" upon a single consummated past transaction.

If the Government cannot by arbitrary fiat say that that which has been a part of an estate remains as a part of the estate for taxation purposes, *a fortiori*, the Government cannot by arbitrary fiat bring back the past and make "excisable" water which has long since gone over the dam.

It is wholly unreasonable, arbitrary and subversive of liberty to impose *nunc pro tunc* a graduated tax on completed acts of generosity not taxable when they were performed. All retroactive laws are abhorrent. No past "transaction" should be excisable. It is not the act of a free government, but an act of tyranny, to ordain that a right free when exercised must bear a retroactive burden.

III. THE TAX IS ARBITRARY AND UNREASONABLE BECAUSE GRADUATED AND OTHERWISE LACKING IN UNIFORMITY.

The tax imposed by the Act varies from "1 per centum of the amount of taxable gifts not in excess of $50,000" to "40 per centum of the amount by which the taxable gifts exceed $10,000,000" (Section 319). It is, then, a graduated tax. Such a tax is unconstitutional.

The State of Wisconsin imposed a graduated tax upon inheritances, including all transfers *mortis causa*. The Act provided that transfers within six years of the transferor's death were to be conclusively presumed to have been made in contemplation of death. This Court held the Statute unconstitutional: *Schlesinger* v. *Wisconsin*, 270 U. S. 230 (1926), McReynolds, *J.*, saying on p. 240:

> "Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, They Are Subjected to Graduated Taxes Which Could Not Properly Be Laid on All Gifts or, Indeed, Upon Any Gift Without Testamentary Character."

It is significant that Mr. Justice Holmes, though dissenting, said nothing on the subject of graduated taxes which conflicts with that statement in the opinion of the Court.

Moreover the Act discriminates between residents and non residents. A resident citizen is allowed a general exemption of $50,000. No such exemption is allowed to a non resident. (Section 321.) This is purely arbitrary. On the other hand there is a discrimination against the resident citizen. He is taxed on all transfers of "property wherever situated," while the non-resident citizen is taxed only on transfers of "property situated *within the United States.*" (Sec. 319.) Thus an American citizen, resident in Europe, may remove all his personal property and give it away and avoid the gift tax; but a resident citizen cannot do this. A resident citizen must pay a gift tax on his transfer of French real estate; a non-resident need not.

In addition the tax makes an arbitrary discrimination based upon the amount of individual gifts. "Gifts the aggregate amount of which to any one person does not exceed $500" per annum are exempt. $51,000 may be equally divided between 102 people without tax. If divided equally amongst 101 persons, the donor is taxable. The foregoing would seem to be not only unreasonable but reasonless.

IV. A TAX ON GIVING IS A TAX ON PROPERTY.

Property in a thing is the sum of the rights, privileges, powers and immunities which the owner of the thing lawfully enjoys in respect to it. Property is the sum of its essential attributes. In

> *Grand Rapids Booming Company* v. *Jarvis*, 30 Mich. 308, 320 (1874), it was said:

> "Of what does property practically consist but of the incidents which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to the lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of' "?

And all the incidents of property are necessary to its existence; Take away a single one and what is left is no longer property. As the Court of Appeals of New York said in

> *Wynehamer* v. *People*, 13 N. Y. 378, 398 (1856):
>
> "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation."

The attributes of property need not all be taken; it is enough if *one* be taken:

> *Portsmouth Harbor Land & Hotel Co.* v. *U. S.*, 260 U. S. 327 (1922);
> *Peabody* v. *U. S.*, 231 U. S. 530, 538 (1913).

Shooting over land

In New York it is held that the erection of an elevated railway was a substantial diminution of the property rights of the adjoining owners, for which they were entitled to compensation in eminent domain proceedings:

> *Caro* v. *Metropolitan Elevated Railway Co.*, 46 Super. Ct. (14 J. & S.) 138 (1880);
> *Story* v. *New York Elevated R. R. Co.*, 90 N. Y. 122 (1882).

Mexico has recently adopted laws requiring foreign owners of petroleum rights to apply for concessions; but these concessions may not be granted except to Mexicans, or to Mexican companies owned 51 per cent. by Mexicans. The State Department has protested, *inter alia*, because of the deprivation of property involved in limiting the right of disposition to Mexican buyers. International law protects not merely the fee, but the right of enjoyment, including the right of disposition.

Or as was said in

People v. *Otis*, 90 N. Y. 48, 52 (1882):

> "*Depriving an owner of property of one of its essential attributes, is depriving him of his property.*"

And Chancellor Kent says (Commentaries, Part V, p. 320):

> "The exclusive right of using and transferring property follows as a natural consequence of the perception and admission of the right itself."

This Court recognizes these rights of property. It said, in *Powell* v. *Pennsylvania*, 127 U. S. 678, 684 (1887):

> "The main proposition advanced by defendant is that his enjoyment, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The Court accedes to this general proposition as embodying a sound principle of constitutional law."

And in *Buchanan* v. *Warley*, 245 U. S. 60 (1917), the Court said, at page 74:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property."

Certain rights of property are so fundamental that their sum constitutes property itself. A tax on the exercise of any one of them is a direct tax upon property:

> *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601 (1895).

Since a tax upon the right to receive the income of a property is a direct tax, *a fortiori* a tax upon the right to dispose of property by gift is a direct tax; the right to give property away is even more intimately wrapped up with the nature of property itself than the right to receive the income of property.

Again, in *Dawson v. Kentucky Distilleries Company*, 255 U. S. 288 (1921), this Supreme Court held that a man has the right to take possession of his property, holding that a tax on the right to remove whiskey from a bonded warehouse, where it was required by law to be placed, was a direct tax.

In *Nicol v. Ames*, 173 U. S. 509, 521 (1898), Mr. Justice Peckham said:

> "A tax upon every sale made in any place . . . is really and practically upon property."

While this was said by way of dictum, it is a very positive statement that an owner of property has a right to sell.

V. THE RIGHT TO GIVE IS NOT A PRIVILEGE TAXABLE BY CONGRESS.

All indirect taxes are taxes on privileges of one kind or another. Broadly speaking, they fall into two classes: (a) *inheritance taxes*, used as a generic term to include inheritance taxes proper, legacy taxes and estate taxes; (b) *business taxes*.

(a) The gift tax is not within the former. It applies generally. There are special provisions directly applicable to gifts *mortis causa*: *Shwab* v. *Doyle*, 258 U. S. 529 (1922).

(b) As typical examples of business taxes may be noted taxes:

1. On the privilege of engaging in the insurance business (measured by gross receipts): *Pacific Ins. Co.* v. *Soule*, 7 Wallace 433 (1868).

2. On the privilege of a state bank to issue bank notes for use as currency: *Veazie Bank* v. *Fenno*, 8 Wallace 523 (1869).

3. On the privilege of doing business at "exchanges"—a war tax: *Nicol* v. *Ames*, 173 U. S. 509 (1899).

4. On the privilege of selling "calls" for stock: *Treat* v. *White*, 181 U. S. 264 (1901).

5. On the privilege of selling tobacco: *Patton* v. *Brady*, 184 U. S. 608 (1902).

6. On the privilege of disposing of property in the form of certificates (of stock): *Thomas* v. *U. S.*, 192 U. S. 363 (1904).

7. On the privilege of engaging in the sugar refining business: *Spreckles Sugar Ref. Co.* v. *McClain*, 192 U. S. 395 (1904).

8. On the privilege of engaging in the business of making oleomargarine: *McCray* v. *U. S.*, 195 U. S. 27 (1904).

9. On the privilege of doing business in the form of a corporation: *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911).

The distinction between these and all other privilege taxes is obvious. To give is to exercise an ordinary and indispensable right inherent in property itself. The right to regulate and tax the transmission of property by death is wholly different. The right to regulate and tax business is also wholly different.

CONCLUSION.

"Logic and taxation are not always bedfellows." But should not the rule of reason apply in enforcing constitutional limitations upon the power of government? And should not this rule apply even in a tax case?

It was of the essence of the original compact that the Congress should have no power to levy a direct tax without apportionment. From the point of view of common sense and substance the Congress has violated the compact. If generosity is to be taxed at all, the power is one reserved exclusively to the States. Some subject matters of taxation besides land should be within the exclusive jurisdiction of the States.

The conflicts in our dual government, unless correctly resolved, will breed untold hardship and expense. Thus, the decision in *Maxwell* v. *Bugbee*, 250

U. S. 525 (1919), (from which Mr. Justice Holmes, Mr. Justice Van Devanter, Mr. Justice McReynolds and the late Chief Justice dissented), that State A may tax the estate of a decedent elsewhere domiciled merely because a part of the estate is invested in the stock of a corporation of State A, has had far reaching and disastrous consequences.

Property is of the essence of civilization; the power to give is of the essence of property; whatever takes away or taxes that right to give is a direct burden upon property qua property. The gift tax is a direct tax.

IRA JEWELL WILLIAMS,
NATHAN GLICKSMAN,
LOUIS QUARLES,
Amici Curiæ.

Ira Jewell Williams, Jr.,
Brown & Williams,
Glicksman & Gold,
Lines, Spooner & Quarles,
Of Counsel.

...reme Court of the United States

OCTOBER TERM, 1926.

Docket No. [redacted] 154

JOHN W. BLODGETT,
Plaintiff-in-Error,
against

...ARLES HOLDEN, as Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant-in-Error.

...TIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

...EF OF C. ALEXANDER CAFFEY AND RUSSELL L. ...RADFORD AS AMICI CURIAE AND ON BEHALF OF GEORGE McNEIR.

C. ALEXANDER CAFFEY,
RUSSELL L. BRADFORD,
Amici Curiae.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1927.

JOHN W. BLODGETT,
Plaintiff-in-Error,

against

CHARLES HOLDEN, as Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant-in-Error.

DOCKET No. 779.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF C. ALEXANDER CAPRON AND RUSSELL L. BRADFORD AS AMICI CURIAE AND ON BEHALF OF GEORGE McNEIR.

The undersigned, C. Alexander Capron and Russell L. Bradford, upon leave of this Court granted on May 16th, 1927, submit the following brief, as *amici curiae*, and on behalf of George McNeir, the plaintiff in *McNeir* v. *Anderson*, which case is pending in this Court upon writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit (Docket No. 966).

With the exception of one point the questions presented in *Blodgett* v. *Holden* are substantially the same questions presented in the case of *McNeir* v. *Anderson*. In the case of *Blodgett* v. *Holden* the gift consisted in

the main part of state and municipal bonds. The gifts in the *McNeir* case were of cash and corporate stocks. In view of the practical identity of the questions presented we shall address our argument to the court as though we were arguing the questions incident to and presented by the case of *McNeir* v. *Anderson*.

Facts.

On January 8th, 1924, and prior not only to the enactment of the Revenue Act of June 2nd, 1924, but prior to its introduction in Congress, and to any public discussion, so far as we are advised, of a tax upon gifts, George McNeir transferred by deed of trust to The Farmers' Loan and Trust Company, as Trustee, certain shares of stock having a then market value of $806,400.00. He made certain other transfers or gifts of cash during 1924, those made before the effective date of the Gift Tax Act being in the sum of $600.00, and those made subsequently amounting to $3,700.00. During that year he also made gifts in the sum of $12,411.50 to charitable, religious, educational and scientific organizations but these were exempted from the tax by the Act. The total of the gifts amounted to $822,111.50. Deducting the exemptions, amounting to $12,411.50 and the $50,000.00 personal exemption to residents of the United States, left a balance of $760,700.00 which was alleged to be subject to the tax, and the tax thereon of $47,284.00 was collected over the protest of, and under duress upon, McNeir by the collector of internal revenue. (See Transcript of Record, p. 56). An action to recover the tax was brought in the United States District Court for the Southern District of New York on February 7th, 1925. The collector thereafter moved to dismiss the complaint which set forth the above facts upon the ground that it did not state facts sufficient to constitute a cause of action.

The United States District Court for the Southern District of New York declared the statute unconstitutional on February 15, 1926 (10 Fed. (2d) 813). The United States Circuit Court of Appeals for the Second Circuit upon writ of error reversed the decision of the District Court (16 Fed. (2) 970). This court granted a writ of certiorari on March 21st, 1927, and upon subsequent motion made by counsel for the said plaintiff to advance the said cause to be heard with that of *Blodgett* v. *Holden*, on May 16th, 1927 denied the said motion, but granted leave to counsel to file a brief as *amicus curiae* in the case of *Blodgett* v. *Holden*, the case now in suit.

The *McNeir* case presents the following issues which are also incident to *Blodgett* v. *Holden*:—

First: May the provisions of Part II, Title III of the Revenue Act of 1924 (Sections 319-324 inclusive), properly construed, be applied to gifts by transfer completed prior to the enactment of the said Revenue Act of 1924 on June 2nd, 1924? (Not certified in *Blodgett* v. *Holden*.)

Second: If the said Act is retroactive in terms, is it constitutional when applied to gifts by transfer completed prior to its effective date?

Third: Is not a tax upon gifts *inter vivos*, and not in contemplation of death, a direct tax within the meaning of the Constitution and thus unconstitutional because not apportioned?

Fourth: Without regard to the power of Congress to impose a tax upon gifts, is not the statute in suit unconstitutional because of lack of uniformity and because of its capricious and arbitrary provisions?

POINT I.

Properly construed the gift tax levied by Part II of Title 3 of the Revenue Act of 1924 is not retroactive.

It is a canon of statutory interpretation that taxing acts in case of doubt are construed most strongly against the taxing power and in favour of the taxpayer. *United States* v. *Wigglesworth*, 2 Story 3, B. G. 369; *Blair* v. *Herald*, (1907) 150 Fed. 199, 201; *Eidman* v. *Martinez* (1902) 184 U. S. 578; *United States* v. *Field* (1921) 255 U. S. 257; *Gould* v. *Gould* (1917) 245 U. S. 151, 153.

It is also a cardinal principle of the law that all legislation having to do with human conduct should be construed if possible as having only a prospective effect. Chief Justice Marshall in *Reynolds* v. *McArthur*, 2 Pet. 417, 434, said:

> "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively, unless the language of the Act shall render such construction indispensable."

In *Union Pacific Railroad Co.* v. *Laramie Stock Yards* (1913) 231 U. S. 190 at p. 199, Mr. Justice McKenna expressed the same thought in the following language:

> "Construction, therefore, becomes necessary, and the first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent

rights or by which human action is regulated, unless such be *'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' United States* v. *Heth*, 3 Cranch, 399, 413, 2 L. Ed. 483; *Reynolds* v. *McArthur*, 2 Pet. 417; *United States* v. *American Sugar Refining Company*, 202 U. S. 563, 577; *Windfree, Admr.* v. *Northern Pacific Ruy. Company*, 227 U. S. 296." (Italics ours.)

This Court also said in *U. S.* v. *Heth* (1806) 3 Cranch (7 U. S.) 399, 413:

> "Words in a statute ought not to have a retrospective operation, unless they are so *clear, strong, and imperative*, that no other meaning can be annexed to them. * * * *" (Italics ours).

We submit that a proper and reasonable construction of the statute in suit (Section 319, Revenue Act of 1924) is that it has application only to all gifts made during "the calendar year 1924" *after* the effective date of the Act.

That this is the correct construction of the act is indicated not only by the provisions of the act itself, but also by the amendatory act of 1926. Section 1104 of the Revenue Act of 1924 stated, "Except as otherwise provided, this act shall take effect upon its enactment."

It was otherwise provided in Title II relating to income taxes. Section 283 provided the income tax provisions should take effect as of January 1st, 1924. It was also otherwise provided in Title VIII, relating to stamp taxes. Section 800 made the new stamp taxes effective thirty days after the enactment of the act. But there is no provision that the gift tax law shall take effect except at the date of the enactment of the law, to wit, on June 2, 1924.

That Congress intended that that law should take effect only on June 2, 1924, and should not relate to gifts

made prior thereto, is shown by the provisions of the amendatory act of 1926. Section 319 of the law of 1924 specified the rates of the tax on gifts. Section 324 of the Revenue Act of 1926 amended Section 319 by reducing the rates of tax. Congress provided in subdivision (b) of Section 324 of the 1926 Act, that this reduction in rates should take effect as of June 2, 1924. Thus we find that if gifts made prior to June 2, 1924, were subjected to a gift tax, they are to be taxed at the rate originally specified in the 1924 Revenue Act, whereas the gifts made after June 2, 1924, are to be taxed at the reduced rates. Obviously, Congress did not intend to so provide.

It is also significant that it was specifically provided that the income tax provisions of the 1924 Revenue Act should take effect as of January 1st, 1924. Why was this done, if the provisions relating to the income collected during the taxable year, or during the calendar year, must be construed as referring to the income collected during the entire calendar or taxable year.

The provisions of the Federal Estate Tax Act of 1916 were held by this court not to be so strong, clear and imperative as to render unavoidable a construction that transfers completed prior to the effective date of the act were within the provisions of the law.

Shwab v. *Doyle* (1922) 258 U. S. 529;
Union Trust Co. of San Francisco v. *Wardell* (1922) 258 U. S. 537;
Levy v. *Wardell* (1922) 258 U. S. 542;
Knox v. *McElligott* (1922) 258 U. S. 546.

In the first three of the above cases, this court construed the words "any transfer of which the decedent *has at any time* made a transfer" etc. as having no application to transfers made prior to the passage of the Act. And this notwithstanding the Federal Estate Tax Act of September 8th, 1916 (See Section 201, Revenue

Act of 1916, Title II, 39 Stat. 777-780) had provided definitely "that a tax * * * is imposed upon the transfer of the net estate of every decedent *dying after* the passage of this Act * * *", and by virtue of Section 202 had defined what property or elements constituted the gross estate, and had said that the estate should include "Any transfer of which the decedent *has at any time* made a transfer, etc."

In *Lucellyn* v. *Frick* (1925) 268 U. S. 238, this court likewise construed the language of the Revenue Act of February 24, 1919 (40 Stat. 1057) Section 402 (b) as having no application to insurance taken out by the decedent upon his own life payable to specifically named beneficiaries, when the policies were taken out prior to the passage of the Act in question.

It is the established practice of this court to avoid giving to a statute a construction which involves constitutional difficulties and doubts, if another and reasonable construction may be given it. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390; *U. S.* v. *Jim Fucy Moy*, 241 U. S. 394, 401; *Hovey* v. *De Long H. & E. Co.*, 211 N. Y. 410, and *Lucellyn* v. *Frick* (1925) 268 U. S. 238, 251. In the latter case the Court, through Mr. Justice Holmes, said (pp. 251-252):

> "Acts of Congress are to be construed *if possible* in such a way as to avoid grave doubts of this kind. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

By construing the law as subjecting to the tax only such gifts as were made after June 2, 1924, grave doubt

as to the constitutionality of the statute upon one score will be relieved. Such construction will preserve the general principle "that laws are not to be considered as applying to cases which arose before their passage," and no unexpected liability will be imposed on persons who made gifts before that date, "that, if known, might have induced those concerned to avoid it and to use their money in other ways." *Llewellyn* v. *Frick*, 268 U. S. 238, 252.

A literal interpretation will not be given to a statute when by doing so antecedent rights are affected or human conduct given a consequence it did not intend. In *Union P. R. Co.* v. *Snow* (1913), 231 U. S. 204, 213, Mr. Justice McKenna said:

> "Courts will not, as we have seen, *enforce a literal interpretation when by doing so antecedent rights are affected or human conduct given a consequence it did not intend.* Such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative. And we have pointed out that we are repelled from doing so by grave doubts of its legality as well as of its justice. These considerations need not be further expanded. Their strength has been pointed out, and their sufficiency to *prevail over a literal interpretation* of a statute." (Italics ours).

We submit Congress intended that only gifts made after the effective date of the act should be subject to the tax, and that this construction should be given to the statute by the courts.

POINT II.

If the statute is construed to apply to gifts which were completed prior to the enactment of the statute, it is unconstitutional.

Retrospective laws, it has been said, are not only unjust but do not conform with the social compact. When they are punitive they are directly forbidden by the Constitution and are called *ex post facto* laws. (Art. I, Sec. 9). An excise tax connotes the absence of an absolute and unavoidable demand. (*Thomas* v. *United States*, 192 U. S. 363; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Pollock* v. *The Farmers' Loan and Trust Company*, 157 U. S. 429 and 158 U. S. 601). It is a privilege tax and thus must, in order to justify the validity of its imposition, comprehend an election or discretion or choice or the exercise of a privilege, by the person subjecting himself to the tax. If there be no election, no discretion, choice or privilege or option that may be availed of, or if the privilege has already ripened into a right (see *Matter of Craig* (1904) 97 A. D. 289, 181 N. Y. 551), then there is nothing upon which the tax can fasten. In other words, if the privilege or the act is *fait accompli*, to call the tax an excise upon something that is no longer a privilege is a contradiction in terms.

It would seem patent that an excise tax must rest upon an excisable act and that if there is no such act performed after the taxing statute takes effect, there can be no tax. That this is so has been recognized by this court and by the courts of the various states when attempts have been made by the states to impose excise or indirect taxes upon transactions or transfers completed before the effective date of the taxing statute.

The state courts, when death duties or inheritance taxes were sought to be applied retrospectively, have,

with practical unanimity, decided that such legislation is unconstitutional. The leading case and one that has been cited by the Supreme Court of the United States (*Chanler* v. *Kelsey*, (1907) 205 U. S. 466, 480; *Llewellyn* v. *Frick* (1925) 268 U. S. 238, 251) is the case of *Matter of Pell* (1902) 171 N. Y. 48. The statute involved in the *Pell* case was one in terms imposing a tax upon the coming into actual possession or enjoyment of remainders or estates in expectancy, which had vested prior to June 30th, 1885. The New York Court of Appeal held the statute to be unconstitutional. The Court said, at pp. 55-56:—

> "It, therefore, follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation * * *. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment."

It is now definitely settled that a state may not impose a succession or transfer tax or an excise where the property has vested or been transferred prior to the enactment of the statute. See *Matter of Vanderbilt* (1902) 172 N. Y. 69; *Matter of Craig*, (1904) 97 A. D. 289, aff'd on opinion below 181 N. Y. 551; *Matter of Lansing* (1905) 182 N. Y. 238; *In re Lyon* (1922) 233 N. Y. 208; *Andrew Carnegie Estate*, aff'd Court of Appeals 236 N. Y. 517; *Matter of McKelway* (1917) 221 N. Y. 15, 19.

The highest courts of other states have followed the *Pell* case and have, in substance, held that if there is no succession or no transfer after the effective date of the Act, the death duty or succession tax may not apply. *Hunt* v. *Wicht* (1917) 174 Cal. 205, 162 Pac. 639; *State* v. *Probate Court of Washington County* (1907) 102 Minn. 268; *Miller* v. *McLaughlin* (1905) 141 Mich. 425; *Eury* v. *State* (1905) 72 Ohio St. 448; *State* v. *Safe Deposit &*

Trust Co. (1918) 132 Md. 251; *Lacey* v. *State Treasurer* (1911) 152 Iowa 477; *Herriott* v. *Patton* (1902) 115 Iowa 648; *Commonwealth* v. *Welford* (1913) 114 Va. 372; *Succession of Stauffer* (1907) 119 La. 66, 70; *In re Collateral Inheritance Tax* (1896) 88 Maine 587; *Carter* v. *Whitcomb* (1908) 74 N. H. 482; *Commonwealth* v. *McCauley's Executor*, 166 Ky. 450.

That a transfer or a succession tax, whether the transfer tax be one imposed upon transfers *inter vivos* or imposed upon transfers by death, must have a transfer or a succession upon which the tax can fasten, was tersely expressed by Mr. Justice Holmes in his dissenting opinion in *Chanler* v. *Kelsey*, 205 U. S. 466, where he said at p. 480:

> "If then a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. *But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid.* No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Seaman*, 147 N. Y. 69." (Italics ours).

These words seem entirely appropriate in connection with the Gift Tax Act of 1924 if we substitute in place of the word "succession" the words "transfer by gift". Mr. Justice Holmes there recognized and expressed the principle that a tax upon a succession which had been completed would not be a tax upon the succession. It is, of course, equally true that an attempt to assess a tax upon a gift by transfer that has been completed, that is a past gift, cannot be sustained as a tax upon the gift or upon the transfer. The same thought is again asserted in *Frick* v. *Pennsylvania*, 268 U. S. 473, when the Court said at page 492, in respect of the Pennsylvania Inheritance Tax Law:

> "The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the State Court. The tax which it imposes is not a property tax, but one laid on the transfer of property on the death of the owner * * * But to impose either tax the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law."

An excise, as heretofore stated, and as we conceive it, can relate only to the exercise of some privilege, of some permission granted by law, and comprehends the elements of option or choice; after the privilege has been availed of it may no longer be the object of an excise. The privilege having ceased to exist, or the act being impossible then to exercise, there remains no act or privilege, or ordinance of government or license of law to excise. "Where there is no transfer there is no tax and a transfer made before the passage of the Act relating to taxable transfers is not affected by it* * * *." (*Matter of Lansing*, (1925) 182 N. Y. 238, 247.)

In the Lansing case the Court of Appeals of New York said, at page 248:

> "Now, suppose that the state at the time it imposed the inheritance tax instead of enacting that statute had forbidden the making of wills and succession in case of intestacy, itself taking all the property that a decedent might leave at the time of his death, such a statute could have no possible effect on Mrs. McVickar's rights, for those rights had been acquired long before. Therefore, what privilege did she get at that time from the state for which it can charge or impose a tax?"

If what was a privilege (assuming that *the right* of gift ever was a privilege) is no longer a privilege, and has become a right, it is too late to galvanize the dead privilege into life for the purpose of compelling revenue. "When the privilege has ripened into a right it is too late to impose conditions of the character in question." (*Matter of Craig*, 97 A. D. 289, aff'd 181 N. Y. 551).

The Congress may not turn back the tide of time and say that the thing, the act, that occurred yesterday occurs today, or reach back into the remote past and by its touch, its legislative fiat, quicken the departed nonexistent act of another year into a living act of the present, merely to satisfy the demands of revenue. Property and persons may be taxed and the right to impose the tax lies with the Congress. Of course, the property transferred by gift may be taxed, but the imposition of a tax on such property, simply because of the manner in which it was transferred, would not be a proper classification but an arbitrary selection, and thus void and unconstitutional. Similarly the person who made the transfer might be taxed, but similarly Congress could not impose a capitation tax upon a person simply by reason of the fact that he had done a lawful act which was not subject to tax at the time he performed it, for this would be arbitrary selection and not proper classification. There is no greater propriety in the assessment of a tax directly upon a person by reason of his having

taken part in a lawful transaction at some past time than there is in imposing a tax upon redheaded men simply because they are redheaded men. (*Gulf, Colo. & Santa Fe Ry. Co.* v. *Ellis* (1897) 165 U. S. 150, 155).

A. The imposition of a tax upon persons by reason of gifts made by them prior to the effective date of the Act is not taxation but an arbitrary exaction and a taking of property in violation of the Fifth Amendment.

"Arbitrary selection, it has been said, cannot be justified by calling it classification." (*Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417).

To impose a tax upon gifts made five months and two days before the Act took effect and to exclude from the operation of the Act gifts which were made five months and three days or five years and two days before the Act took effect is an arbitrary selection and not classification, and attempts to tax persons or acts so arbitrarily selected have been condemned by this Court.

It was such arbitrary selection as in the statute in suit that compelled this Court in *Schlesinger* v. *Wisconsin* (1926), 270 U. S. 230) to hold unconstitutional a statute of Wisconsin which imposed a tax upon all gifts made within six years of death. Such a tax was not classification but arbitrary selection and thus offended the Fourteenth Amendment to the Constitution. Mr. Justice McReynolds said at pp. 239-240:

> "The Court below declared that a tax on gifts *inter vivos only* could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary'. We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment." (Italics ours)

There does not seem to us any distinction between the arbitrary selection of those making gifts within six years of death under the Wisconsin statute and the arbitrary selection of those who have made gifts within five months and two days under the Federal statute. Both statutes undertake to select a determinable few for the imposition of the tax and leave free all others. This, the court said was such a classification as would be in plain conflict with the Fourteenth Amendment. We submit that it is such a classification, if it be classification at all, as would be in plain conflict also with the Fifth Amendment.

The acts of the Congress are just as amenable to the constitution as the acts of the state legislatures, and when the Congress transcends its power, or undertakes to impose taxation not based upon some reasonable classification but upon its whim or caprice, this court has declared that such a tax is a violation of the Fifth Amendment, for such a tax would amount to nothing more nor less than an arbitrary selection of the subjects of tax.

In *Coolidge* v. *Nichols* (71 L. Ed. 797) (not yet published in the official reporter), the court flatfootedly stated that Congress could not impose a retroactive excise upon a single act or event completed before the imposition of such excise.

The Government had contended that the Federal Estate Tax Act of 1918 (Sections 401, 402 (c) and 409) did not impose a tax upon transfers completed prior to the enactment of the Act, but imposed a tax only upon the estate that passed at death, measured by including in the gross estate, property transferred by the decedent prior to the enactment of the tax law. The court rejected the argument of counsel that the statute did not impose a tax upon the transfers completed prior to the Act for it said, referring to Section 402:

> "The language of this section inhibits the conclusion that only subsequent transfers are to be included."

and the court further said:

> "The language of the statute is not consistent with the idea that it utilizes the gross estate merely to measure a proper charge upon the transfer by death. See Lewellyn *v.* Frick, supra."

The court then continued and stated:

> "Frick *v.* Pennsylvania, 268 U. S. 473-494, rejected a somewhat similar claim, and said: 'Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail."

The court then further proceeded to say:

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress *may not lay a charge upon what is beyond them.* Taxes are very real things and statutes imposing them are estimated by practical results." (Italics ours.)

The court there definitely recognized that the statute itself undertook to impose a tax upon the transfer made prior to death as a part of the estate of the decedent.

This the court said was beyond the power of the Congress.

The court then took up the question of the measurement theory advanced by the Government, that is, that the tax is not upon the transfer prior to death or upon the value of the property so transferred, but was upon the property that passed by death measured by the value of the property that had passed prior thereto, together with the property that passed at death. Such a basis this Court held was a violation of the Fifth Amendment. Mr. Justice McReynolds said (at page 802):

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th Amendment. Brushaber *v.* Union P. R. Co., 240 U. S. 1, 24, 60 L. Ed. 493, 504, L. R. A. 1917 D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917 B, 713; Barclay & Co. *v.* Edwards, 267 U. S. 442, 450, 69 L. Ed. 703, 706, 45 Sup. Ct. Rep. 348. See also Knowlton *v.* Moore, 178 U. S. 41, 77, 44 L. Ed. 969, 984, 20 Sup. Ct. Rep. 747. And we must conclude that Sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Could anything be more arbitrary and capricious than to select a determinable group already in existence, (namely, those who made gifts from January 1st to June 1st, 1924) and subject them to tax, and leave exempt and free of the tax, all those who had done the same thing prior to January 1st, 1924? We submit that whether the attempted tax be direct or indirect, it is nevertheless an unavoidable demand, with no basis of classification, and is imposed upon an arbitrarily selected few. This is

selection of the most definite kind. It is arbitrary and capricious to the highest degree. The tax is made to depend upon the sport of fortune (*Frew* v. *Bowers*, 12 Fed. (2) 625) or upon the whim of Congress as to what date its retrospect may be made to apply.

As shown in the statement of facts, Mr. McNeir made gifts after the passage of the act in question, amounting to $3,700. The tax imposed amounted to $47,284. It is obvious that only by including the gift made by Mr. McNeir on January 8th, 1924, could such a tax be computed. No more graphic example could be presented of the absurdity of the position of the government that a tax upon one transaction upon which Congress may lay an excise, may be measured by including therein transactions which it is beyond the power of Congress to tax. The government has not had the temerity in this case to advance such an argument as the figures show that it would be utterly fallacious.

The tax as imposed is not only arbitrary and capricious, and thus a violation of the due process of law clause of the Fifth Amendment, but it is also in violation of that amendment because it is a taking of private property for public purposes without just compensation.

Before June 2nd, 1924, there was no law or ordinance in respect of gifts *inter vivos*, either State or Federal. From January 1st to June 2nd, 1924, and every year prior to that as far as 1789 a gift might be made without let or hindrance by law. There is no regulatory power in Congress over gifts and that it may not regulate by taxation what it may not regulate directly is settled by this Court. (Child Labor cases (1922), 259 U. S. 20; *Hill* v. *Wallace* (1922), 259 U. S. 44; *Trusler* v. *Crooks* (1926), 269 U. S. 475.) Therefore when the Congress on June 2nd, 1924, says that all who have done with their property during the elapsed period of the year 1924 what they had an unregulatable right to do, shall hand over a

portion either of that property or the property they have remaining, it has done nothing more or less than demand the private property of the citizen. Such a demand is sequestration. It is not even the exercise of the power of eminent domain, for even that power may not be exercised by the Government without compensation for the property taken. No power lies in the Congress to confiscate or to sequester property, without just compensation therefor. Even during the stress and exigency of war property may not be taken for public purposes without just compensation to the owner, or without due process of law. (*Ex parte Milligan* (1866), 4 Wall 2, 121-7; *U. S.* v. *Russell* (1871), 13 Wall 623, 627; *Hamilton* v. *Kentucky Distilleries Co.* (1919), 251 U. S. 146, 155, 156; *U. S.* v. *Cohen Grocery Co.* (1920), 255 U. S. 81, 88.)

If Congress may not during war times, when the very life of government may be in jeopardy, take the property of its citizens without compensation, then clearly the Government may not in peace times, under the guise and cloak of an excise, take the property, not of all its citizens in uniform sums, but of a determinable few arbitrarily selected for the purpose. Selected by the whim and caprice of Congress; selected because they had, before the law was passed, ridden a horse, attended the theatre, or made a gift. A tax so imposed is whimsicality run mad. A tax so imposed is a direct taking of property, is confiscation; so imposed it is repugnant to the Fifth Amendment to the Constitution.

B. If the statute be construed to have retrospective application, it is a direct tax.

In giving the power to the Congress to impose taxes, the Constitution of the United States prohibited it from imposing only one tax, that is a tax upon exports (Art. 1, Sec. 9, Cl. 5) and laid down two regulatory provisions as to the imposition of the two great divisions of taxation, that is, the imposition of direct taxes on the one hand

and the imposition of indirect taxes on the other hand. Duties, imposes and excises, that is, indirect taxes, must be uniform throughout the United States and this uniformity has been held to be a geographical uniformity.

Direct taxes must be apportioned among the several states in accordance with the provisions of Art. 1, Sec. 2, Cl. 3 and Sec. 9, Cl. 4 of the Constitution. So important was this inhibitory regulation upon the Federal Congress in the imposition of direct taxes considered at the time the Constitution was drafted, it was twice expressed, once positively and once negatively, the only occasion of a duplication in that whole instrument.

If the tax in suit be direct then it is unconstitutional. If the tax retroactively imposed, looking at the substance and practical results of the tax law, and not at the form of the statute, is an absolute and unavoidable demand, then the tax is a direct tax. If the element of absolute and unavoidable demand is present in the impact of the tax, then, as this Court has held, the tax becomes a direct tax.

In *Thomas* v. *United States*, 192 U. S. 363, this Court, through Chief Justice FULLER, said at page 371:

> "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is *contingent on the happening of the event of sale*, and the element of *absolute and unavoidable* demand is lacking." (Italics ours.)

To the same effect this Court, in *Flint* v. *Stone Tracy Co.* (1911), 220 U. S. 107, 151, citing the *Thomas* case, said:

> "The requirement to pay such taxes involves the exercise of privileges, and the *element of absolute and unavoidable demand is lacking*. If business is not done in the manner described in the statute, no tax is payable."

If a tax may not be shifted regardless of whether some direct taxes may or may not be shifted, and amounts to an absolute and unavoidable demand, then the tax must be declared by the Courts to be direct and to be void if not apportioned. (*Pollock* v. *The Farmers' Loan and Trust Company*, 158 U. S. 601.)

If there be nothing to transfer after the effective date of the Act, and if there be no act of transferring, then there is nothing upon which the tax can fasten. Mr. Chief Justice White, deciding *Knowlton* v. *Moore* (1900), 178 U. S. 41, said:

> "* * * if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed."

The same is true in the application of the Gift Tax Act of 1924. If there be no transferring, there would be no act to which the tax could apply. If the tax be said to be upon the past act of giving, then there would be no giving during the term of the operation of the statute for that act of giving, that exercise of the right of gift, had ceased. If the tax as retrospectively applied is not upon the giving, as in truth and fact it cannot be and remain an excise, then it must be either on the donor personally, which in substance would be a capitation tax, or upon the property transferred, in either of which cases the tax would offend against the constitutional restrictions.

The tax is, in effect, as retrospectively applied, direct upon the person of the giver. He is immediately and definitely singled out by the language of the statute and called upon to pay a tax, without having at any time had an option or election or a choice as to whether or not he would subject himself to the tax. If this be not an absolute and unavoidable demand, then we submit that we find it difficult to conceive of a case of an absolute and unavoidable demand of a tax.

If the Congress of the United States has the power to impose a so-called excise upon a gift completed prior to the enactment of the Act, then the Congress unquestionably may impose a tax upon every gift made by every individual since the adoption of the Constitution of this Country. If the statute may be read that the Congress imposed a tax upon all gifts made during the calendar year 1924 and the intention of Congress was that the impact of the tax should apply to transfers completed before the enactment of the Act, then it could equally as well have passed a statute reading that for the calendar year 1890 (or e. g. 1875) and each calendar year thereafter a tax shall be imposed upon all gifts by transfer. The amount of the exemption is a question of statutory grace. It has nothing to do with the validity or invalidity of the tax. If retroactive application of the statute may apply for a period of five months and two days, then there is no limit to the retrospect with which a statute may apply. In a constitutional sense a retrospective application of five months and two days may not be distinguished from a period of retroactivity covering twenty, thirty or forty years past.

The Government in the argument of *Eisner* v. *Macomber* (1921) 252 U. S. 189 abandoned its contention that stock dividends constituted income *per se* and tried to uphold the provisions for the taxation of stock dividends upon the ground that the tax was an excise upon the past accumulation of profits and imposed at the time of the translation of the past accumulation into a stock dividend. This court denied this contention and stated that while the Congress could impose a tax upon the past accumulated income at the time of the translation of it into a stock dividend, such a tax would be a direct tax upon property and must be apportioned in accordance with the provisions of the Constitution. The court said, at page 217:—

"That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interest might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. *But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this Court.*" (Italics ours.)

That a tax upon a single act or event completed before the enactment of the law imposing the tax could only be upheld as a direct tax was probably the thought that created such misgivings in the mind of Mr. Justice McKenna, when considering *Schwab* v. *Doyle*, *supra*. He said at p. 535:

"If retroactivity be accepted, what shall mark its limit? The Circuit Court of Appeals found the interrogation not troublesome. It said: 'Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years *prima facie* provision.' In other words, the sense of courts and juries, good or otherwise, might, against the words of the statute, and against what might be the evidence in the case, unhelped by the presumption declared, fix the years of its retrospect. This would seem to make the difficulty or ease of proof a substitute for the condition which the statute makes necessary to the imposition of the tax; that is, the disposition with which the transfer is made; and certainly whether that disposition exist at an instant before death or years before death, it is a condition of the tax.

The construction of the Government is more tenable though more unrestrained. It accepted in

bold consistency, at the oral argument, the challenge of twenty-five years, and a ruling of the Commissioner of Internal Revenue, in bolder confidence, extends the statute to 'transfers of any kind made in contemplation of death *at any time whatsoever* (italics ours) prior to September 8, 1916.' The sole test in the opinion of that officer is 'the date of the death of the decedent.' He fixes no period to the retrospect he declares, but reserves, if he be taken at his word, the transfers of all times to the demands of revenue. In this there is much to allure an administrative officer. Indeed, its simplicity attracts anyone. It removes puzzle from construction and perplexity and pertinence on account of the distance of death from the transfer, risking no chances of courts or juries, in repugnance or revolt, taking liberties with the act to relieve from its exactions to satisfy the demands of revenue."

The decision closed on p. 537 with the following:

> "And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative, and this cannot be said of the words of the Act of September 8, 1916."

Certainly the United States District Court for the Eastern District of Wisconsin could conceive of nothing more direct than the retrospectively applied tax involved in this suit, for the court there said in *LeFebre* v. *Wilkinson* and *Nunnemacher* v. *Wilkinson* (reported in Commerce Clearing House, Board of Tax Appeals and Federal Court Service, 1926, pages 7673, 7674):

> "The Court: I think Mr. Glicksman is right in saying that the whole proposition comes down to the single direct statement: Can an excise tax be effective other than in *future*?
>
> The case comes here really with the necessity, as I might say, of deciding the case definitely. The

proposition that is presented here rests ultimately upon the definitive inclusion or exclusion of elements and ingredients in what is called an 'excise'; I mean, the so-called burden which we term an excise; and it would seem to me that the implication is that as between the Government and the subject who is expected to be reached by the law, either in respect of his property, or as we might say, of his conduct, of his movements, that will be open to choice; the implication in an excise not theretofore existing or not theretofore exacted, to the subject is: 'If you want to do this particular thing, you can do it with the burden attaching to you, which we will now impose on you.'

Then, in the case of a gift, as in the case of certain other taxes that are not direct taxes, the subject can take his choice. If he wants to do it he must submit to the burden which the law imposes upon the doing of the act; but, when it appears that the act has been fully completed prior to the passage of the law, why of course the burden is imposed without the choice of relief by concluding not to exercise the privilege.

Now, when that is so, the question is particularly asked. Here are the gifts made in February and May, 1924, prior to the passage of this act. It seems absurd to say that the Nunnemacher and Lefebor donors should be told on June 2, 1924, that they are now subjected to an excise upon an act wholly beyond their power to revoke, recall, or do a thing in respect of what they had previously done; and how then can you escape the idea, although it is called an excise, that it is nothing more or less than a direct tax, either against their property or against them, in respect of a completed transaction, which, if I might put it that way, at the time Congress passed the law was no longer, as to them, *excisable?*

I am impressed with the fundamental character of that question; that the plaintiffs can well urge it at the threshold of these cases; and being decided favorably to them dispenses with the necessity of considering or, much less, determining the

validity of the law outside of that; and the plaintiffs may take a judgment in each of the cases." (Italics the Court's.)

This Court, so far as we have been able to ascertain, has never yet upheld a retroactive excise upon a single event or happening as upon a gift by transfer completed prior to the enactment of the taxing statute.

The following cases are commonly cited by the Government in support of its position that Congress has unlimited power to impose retroactive excise taxes:—

Flint v. *Stone Tracy Co.* (1910) 220 U. S. 107; *Hecht* v. *Malley*, 265 U. S. 144; *Brushaber* v. *Union Pacific R. R. Co.* (1916) 240 U. S. 1; *Stockdale* v. *Insurance Co.* (1873) 20 Wall. 323; *Patton* v. *Brady* (1902) 184 U. S. 608; *Billings* v. *United States* (1914) 232 U. S. 261.

The facts in these cases do not support the contention.

In *Flint* v. *Stone Tracy Co., supra*, the Court held that an excise might be imposed upon the doing of business in corporate form and that it was not unreasonable to measure the tax by the income received not only after the Act took effect, but also during a few months prior to the enactment of the statute. The tax was something in the nature of a franchise tax of the States, and if the measure of the tax were reasonable, no objection could be found to its imposition. But if the corporation was not doing business upon and after the enactment of the Act in the manner stated in the statute, no tax could have been imposed. The Court distinctly and definitely lays down this qualification in upholding the validity of the statute, for it said, at p. 151:—

> "If business is not done in the manner prescribed in the statute, no tax is payable."

The case of *Heckt* v. *Malley*, 265 U. S. 144, involves substantially the same proposition as that which the

court passed upon in *Flint* v. *Stone Tracy Company*. In the *Hecht* case, the court was considering a capital stock tax, i. e. an excise upon the doing of business as a corporation. In arguing the *McNeir* case in the court below, the government said that in the *Hecht* case "it was held that the provisions of the Revenue Act of 1918, imposing an excise tax upon the privilege of doing business as a corporation, measured by the value of the capital stock for the preceding year, is constitutional, although it imposes a tax upon the doing of business prior to the passage of the Act." The Act was passed February 24, 1919. The year for which the taxes in question were assessed ended June 30, 1919.

In the *Brushaber* case, the court was not called upon to consider whether Congress might impose a retroactive excise tax. The tax there considered was an income tax imposed after the grant of power to Congress to impose such a tax without apportionment. The Sixteenth Amendment did not change the character of the tax. This court had previously held that an income tax upon property, real or personal, was a direct tax. Therefore, the court was considering the propriety of a direct or property tax. The only question really presented was whether it was appropriate to measure this direct tax by the income received not before the constitutional amendment took effect, but after that date, although part of the income had been received before the tax was imposed by statute. This is no authority for the contention of counsel that an excise tax may be imposed retroactively upon a single act or event.

In *Stockdale* v. *Insurance Co.*, 20 Wall. 323, the court was also considering an income tax and the report of that case does not show that counsel argued the question as to whether such an income tax might be retroactively imposed. The questions which the Court considered were whether the Act of 1864, imposing taxes on the income of certain corporations, had expired and also

whether, if it had expired, Congress had effectively revived the Act. Some of the Judges expressed the opinion that the Act had not expired and others that the Act had been appropriately revived. That case did not decide that Congress may retroactively impose a tax upon a single act which had already been competed prior to the enactment of the taxing law.

Clearly *Patton* v. *Brady*, 184 U. S. 608, is not an authority for the contention of the Government. The statute there merely levied a new or increased excise upon tobacco and snuff manufactured and held for sale. The tax did not apply to goods already sold and in the hands of the consumers. There was no retroactivity in the application of this tax.

Billings vs. *U. S.* (1914), 232 U. S. 261, was this. The Act of August 5, 1909, imposed a tax of $7.00 per ton "upon the use of every foreign built yacht, pleasure boat or vessel not used or intended to be used for trade now or hereafter owned or chartered for more than six months by any citizen" of the United States.

Defendant admitted that he being a citizen of the United States had owned and used such a yacht in foreign waters during the year prior to September 1, 1909. This use was in part, viz: August 6, 1909, to September 1, 1909, while the statute was in force. The vessel had been owned for more than six months and had been used after the act was passed. The act was not based on the extent of the use, but merely on the "use". Manifestly the owner was within the express terms of the act and the Court so held, page 282.

Here, again we find a continuation of the excisable act after the taking effect of the statute, as in the *Flint* v. *Stone Tracy Company* and *Hecht* v. *Mallett*. There is a clear distinction between all of these cases, and the imposition of a tax upon a single transaction which has been completed before the passage of the tax law.

While this court has never held valid a retroactive tax upon a single act or event already consummated, there is direct authority that such an attempted tax is in violation of the constitution.

We submit that we have the direct authority of this Court in *Nichols* v. *Coolidge* not only that a transfer made prior to the enactment of the Act may not be subjected to a tax upon the death of a decedent who may have died after the passage of the Act, but going further and saying that the transfer prior to the enactment of the Act may not even be used as a measure for the reckoning and computation of the tax upon property that was properly subject to the tax under the constitutional powers.

We, therefore, submit that if the tax may be construed to apply to gifts made during the year 1924, prior to the effective date of the Act, then the statute is unconstitutional because it is not only a direct tax in that it is an absolute and unavoidable demand, but it is also a violation of the fifth amendment, in that it is not taxation but an arbitrary demand on a selected few, and unsupported by a reasonable classification.

POINT III.

The gift tax is a direct tax, and, not being apportioned as required by the Constitution, is void whether it be applied retrospectively or prospectively.

1. Taxes on property or an element of property are direct taxes.

While at times there may have been some confusion of thought as to the differentiation of direct and indirect taxes, it is now definitely recognized by our courts that

taxes on property or on persons by reason of their ownership of property are direct taxes.

Thus in *Eisner* v. *Macomber* (1921) 252 U. S. 189, p. 217, after conceding that the Congress has power to tax shareholders upon their property interests in shares of corporations, Judge Pitney writing the opinion of the court stated:

> "That this would be taxation of property because of ownership, and hence would require apportionment * * *, is settled beyond peradventure by previous decisions of this court."

In *Dawson* v. *Kentucky Distilleries Co.* (1921) 255 U. S. 288, 294, Mr. Justice Brandeis writing the opinion of the court said:

> "To levy a tax by reason of ownership of the property is to tax the property."

In *Knowlton* v. *Moore* (1900) 178 U. S. 41, Mr. Justice White conceded that taxes "which are the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, are direct taxes."

The Supreme Court of Kentucky in *Craig* v. *Taylor & Sons* (1921) 192 Ky. 36, at p. 39, said:

> "The mere right to own and hold property cannot be made the subject of excises since the levying of a tax by reason of ownership of property is to tax the property."

The Mississippi Court in *Thompson* v. *Krautzer* (1916) 112 Miss. 165, at page 167, said:

> "A tax on a thing is a tax on all its essential attributes; *and a tax on an essential attribute of a thing is a tax on the thing itself.* * * * No definition of property can be framed which does not include the right of ownership. Consequently, no

> tax can be imposed on the right of ownership, which is not also a tax on property." (Italics ours)
>
> Cited in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 294.

It will be observed that in some instances the postulate that a tax on property is direct, has been expressed by saying that a tax on the ownership of property, or on property by reason of ownership, is a direct tax. However, these are merely variations of expression, for as we shall hereafter point out, the word "property" includes within its concept ownership, and an object independent of the ownership thereof is not property. There is now unanimous agreement that a tax on property generally (i. e. land or personalty by reason of ownership) is a direct tax.

This is fundamental and has long been accepted. The questions which have concerned the courts are those relating to taxes, which in form were excise or indirect taxes, but which on analysis were found to be taxes on property or on an element of property and, therefore, direct.

The form in which the tax is clothed is not controlling. The substance and effect must determine its character. In *Galveston R. R. Co.* v. *Texas*, 210 U. S. 217, 227, Mr. Justice Holmes said:

> "Neither the state courts, nor the legislature, by giving a tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

This court has repeatedly looked through the form and determined the validity of taxing statutes by their practical results, for "taxes are very real things and statutes imposing them are estimated by practical results." Mr. Justice McReynolds in *Coolidge* v. *Nichols* (1927), 71 L. ed. 797-801.

A tax upon persons or upon property, or upon income from property or upon an element of property which gives it value, is a direct tax. Such was the determination of this court in *Pollock* v. *The Farmers' Loan and Trust Company* (1895), 157 U. S. 429; 158 U. S. 601.

Mr. Justice Field, in his concurring opinion (157 U. S. at page 591) said:

> "It must be conceded that whatever affects any element that gives an article its value in the eye of the law, affects the property itself."

Chief Justice Fuller, declared, after referring to indirect taxes, 157 U. S. 558:

> "But a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

Reiterating the fundamental proposition that the substance and not the form is controlling, Chief Justice Fuller said, page 581:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. *It is the substance and not the form*, which controls as has indeed been established by repeated decisions of this Court." (Italics ours.)

After the rehearing, 158 U. S. 601, 627, Chief Justice Fuller said:

> "Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its

plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

"There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by *forced distinctions between that which gives value to property, and the property itself.*" (Italics ours.)

There can be no disputing this truth so forcibly expressed by Chief Justice Fuller. An element of property that gives it value is property. The artificial segregation of such an element does not change its character. It is of the same substance of the body from which it issues. It is property.

This principle has found repeated recognition both in this and in the State courts.

Thus in *Dawson* v. *Kentucky Distilleries Co.* (1921) 255 U. S. 288, the court held that a tax on the right to take possession of property, that is, the right to take possession of whiskey from a bonded warehouse where it was required by law to be placed, was a direct tax, for possession, or the right to take possession, is one of the elements of property, and is not subject to an excise tax.

Mr. Justice Brandeis said, page 288:

"The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; * * * "

The question there considered related to a Kentucky license tax on whiskey distillers or warehousemen with respect to whiskey withdrawn from bond or shipped in bond outside the State. The Court held this was a *property* tax, and hence void, simply because an examination of the possible contingencies in which the tax would or would not become due (p. 293) led to the conclusion that the thing *really taxed* was the *owner's right to take possession of his own property* and that "to tax the right is to tax the value" (p. 294) saying:

> "To levy a tax by reason of ownership of property is to tax the property. Compare *Thompson* v. *Kreutzer*, 112 Miss. 165; 72 So. 891; *Thompson* v. *McLeod*, 112 Miss. 383, L. R. A. 1918 C. 893; 73 So. 193, Ann. Cas. 1918 A, 674. It can not be made an occupation or license tax by *calling* it so. See *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 148 150; 55 L. Ed. 389, 412, 413; 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, 55 L. Ed. 428, 31 Sup. Ct. Rep. 361; *U. S.* v. *Emery, B., T. Realty Co.*, 237 U. S. 28, 59 L. Ed. 825, 35 Sup. Ct. Rep. 499."

Thompson v. *McLeod* (1916) 73 So. 193, 112 Miss. 383, so cited by the court, involved a statute taxing the extraction of turpentine from any trees in the State. The Supreme Court of Mississippi held that this was a property tax, saying at page 388:

> "This Act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to pull the ripe pecans from the pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

The question as to whether a tax, claimed by the government to be indirect but, in effect, a tax on property, was again presented to the United States Supreme Court when it was called upon to determine whether Congress could lay a tax upon stock dividends. *Eisner* v. *Macomber* (1921) 252 U. S. 189.

Upon the first argument, the government contended that this was an income tax, but upon the reargument, the government abandoned its position that a stock dividend brought new income to the shareholder, and thus came within the sixteenth amendment to the Constitution. The government there argued, in effect, that the declaration of a stock dividend was a taxable occasion, as the previous accumulation of profits by the corporation for the benefit of its stockholders became manifest through such declaration, and that it was appropriate for Congress to lay a tax thereon.

The Court held that this was not tenable because if it was not income it did not come within the Sixteenth Amendment *and any other tax would be a tax, whether called an excise or not, upon the past accumulated property, and would thus be a direct tax.* The Court said (252 U. S. at p. 217):

> "* * * the Government * * * virtually abandoning the contention that a stock dividend increases the interest of the stockholder or otherwise enriches him, insisted as an alternative that, by the true construction of the Act of 1916 the tax is imposed not upon the stock dividend, but rather upon the stockholders' share of the undivided profits previously accumulated by the corporation; the tax being levied as a matter of convenience at the time such profits become manifest through the stock dividend. If so construed, would the act be constitutional?
>
> "That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of

> the Company, including its accumulated and undivided profits, is equally clear. But that this would be *taxation of property because of ownership*, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this Court."

The Court there held that the tax was unconstitutional.

2. The right of gift is an essential element of property.

(a) Property is defined as ownership or dominion; the legal right to the possession, use, enjoyment and disposal of a thing.

The word property is not used to denominate matter or any particular concrete object independently of the ownership thereof, but rather those rights in or to an object which are comprehended in the term ownership. Thus in the Standard Dictionary "property" is precisely defined as

> "Ownership or dominion; the legal right to the possession, use, enjoyment and disposal of a thing; * * * "

It is also defined as

> "Any object of value that a person may lawfully acquire and hold. Anything that may be owned."

It will be seen that while this definition refers to objects, it does so only in connection with their ownership. Independently of ownership and the rights pertaining thereto the term is inapplicable, for the concept of property signifies ownership.

The sea is not spoken of as property. Rather the law says it is the property of no man or nation. Nor are fish in the Atlantic Ocean property, but when they are caught

and owned by someone they at once become property. Although concrete objects may exist without ownership, until ownership attaches they are not property.

It follows that while objects are sometimes referred to as property, that term is always used to denote the abstract rights of ownership pertaining thereto.

In the law property has no other significance.

Blackstone says (1 Wend. Blackstone's Commentaries, Chap. 1, p. 138):

> "The third absolute right inherent in every Englishman, is that of property, which consists in the *free use, enjoyment and disposal of all his acquisitions*, without any control or diminution, save only by the laws of the land. The origin of private property is probably founded in nature, * * * ;" (Italics ours.)

Rutherforth in his Institutes of Natural Law (1799 Ch. 3, p. 53) treating of property, says:

> "Our right to things is either such an one as is common to us with all mankind, or such an one as is peculiar to ourselves. Some things, belong to us, because they belong to the species in general, and to us among the rest. Other things belong to us by such an right, as excludes all the rest of the species from having anything at all to do with them. Such an *exclusive right to things is called property*. Where things are thus fully our own, or where all others are excluded from meddling with them, or from interfering in any manner about them; it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him *from disposing of them as he pleases*, so that, property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them either *by exchanging them for other things, or by giving them away* to any person, without any valuable consideration in return, *or even throwing them away*,

which is usually called relinquishing them." (Italics ours.)

Again he said, having reference to the Limitations of Property, in Ch. 4, p. 82:

> "Full property in a thing is a perpetual right to use it to any purpose and *to dispose of it at pleasure*. Property, in the strict notion of it, is such a right to a thing as excludes all persons, except the proprietor from all manner of claim upon it • • • ". (Italics ours.)

It was said in *Todd* v. *Wick Bros.* (1881) 36 Ohio State, 370, at p. 385, that:

> "In a strict legal sense, property, whether the term is applied to things animate or inanimate, consists in the right to their *use, enjoyment*, and *disposition*." (Italics ours.)

In The Chicago & Western Indiana R. R. Co. v. *The Englewood Connecting Ruy. Co.* (1886) 115 Ill. Rep. 375, 385, the Court said:

> " • • • for property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the use of a thing."

In *Jaynes* v. *Omaha Street R. Co.* (1898) 53 Neb. 631, 653, the Court said:

> " • • • • 'Property' in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, and generally to the exclusion of all others, and *doubtless this is substantially the sense in which the word is used in the constitution*, as to the taking or damaging of private property for the public use."

In *Smith* v. *Campbell* (1825) 10 N. C. 595, 597, the Court said:

> "Property is a thing over which a man may have dominion and power to do with it as he pleases, so that he violates not the law. He may *give, grant, or sell it at his pleasure.*" (Italics ours.)

In *Eaton* v. *B. C. & M. R. R.* (1872) 51 N. H. 504, 511, the Court said:

> "The term 'property', although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' "

It will be noted that in all these definitions of property the right of disposition is stated to be an essential element thereof.

Sometimes the courts refer to these rights of possession, use, enjoyment and disposition as essential attributes or incidents of property. Whether it is said such a right is an essential element, or attribute, or incident, the meaning is the same. Such a right is inherent in and is a constituent part of property. If such right is taken or destroyed, it is property which is taken and destroyed, and this the courts have uniformly held.

The United States Supreme Court in *Buchanan* v. *Warley* (1917) 245 U. S. 60, 62 L. Ed. 149, said (in holding an ordinance prohibiting a negro from residing in any city block in which a majority of the houses are occupied by whites invalid) at page 74:

> " * * * Property is more than the mere thing which a person owns. It is elementary that it includes the right to *acquire, use, and dispose* of it.

The Constitution protects these essential attributes of property." (Italics ours.)

The Courts of Michigan, in 1874 in the case of *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308, 320, expressed the view as follows:

> "Of what does property practically consist but of the *incidents* which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to the lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of'? Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practically valuable to him? And among the incidents of property in land, or anything else, is not *the right to enjoy its beneficial use*, and so far to control it as to exclude others from that use, the most beneficial, *the one most real and practicable idea of property*, of which it is a much greater wrong to deprive a man, than of the mere abstract idea of property without incidents? This use, or the right to control it with reference to its use, constitutes, in fact, all that is beneficial in ownership, *except the right to dispose of it; and this latter right or incident would be rendered barren and worthless, stripped of the right to the use.* Property does not consist merely of the right to the ultimate particles of matter of which it may be composed, * * * but of those properties of matter which can be rendered manifest to our senses and made to contribute to our wants or our enjoyments." (Italics ours.)

(b) The right of disposal as well as that of use and enjoyment is inherent in and is an essential element of property.

In *Kent's Commentaries* (14th Ed.) Pt. V, p. 320, 501, it is said:

> "The exclusive right of using and *transferring property* follows as a natural consequence, from the perception and admission of the right itself. But, in the infancy and earlier stages of society, the right of property depended almost entirely upon actual occupancy; * * *". (Italics ours.)

He again says, at p. 326 (509):

> "3. *The Rights of Alienation.* The power of alienation of property is a *necessary incident* to the right of property, and was dictated by mutual convenience and mutual wants. It was first applied to movables * * *". (Italics ours).

The Court of Appeals of New York in *Wynehamer* v. *The People* (1856) 13 N. Y. 378, held that:

> "The provisions of the act to prevent intemperance (Laws of 1855, p. 340), substantially destroy the property in intoxicating liquors owned and possessed by persons within the State, when the act took effect.
>
> In its application to such liquors so owned and possessed, the act violates the provision of the state constitution which declares that no person shall be deprived of life, liberty, or property, without due process of law." (From Syllabus.)

The Court, through Comstock, J., said, page 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment."

The Court then cites Kent's statement above quoted concerning the right of alienation of property, and states, page 398:

> "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional pro-

vision intended expressly to shield private rights from the exercise of arbitrary power."

In *Sherman* v. *Elder* (1862) 24 N. Y., 381, 384, the same Court declared:

> "Property considered as an exclusive right to things contains not only a *right to use them but a right to dispose* of them either by exchanging them for other things or *by giving them away to any other person without any consideration, or even of throwing them away.*" (Italics ours.)

In *People ex rel. Manhattan Sav. Trust* v. *Otis* (1882) 90 N. Y. 48, 52, the Court said:

> "Depriving an owner of property *of one of its essential attributes*, is depriving him of his property within the constitutional provision, and a legislative declaration that upon the publication of notice, a negotiable security shall no longer be transferable, is not due process of law, working a forfeiture of the right given by the contract." (Italics ours.)

To the same effect is the case of *Exchange Bank* v. *Hines* (1853) 3 Ohio State 1, 8, wherein the Court said:

> "It is a fundamental principle, that, 'property, considered as an exclusive right to things, contains not only a right to use those things, but a right to *dispose* of them either by exchanging them for other things, or by *giving them away* to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them'. Rutherford's Institutes, 20 Puffendorf, Ch. 9, b. 7." (Italics ours.)

The Supreme Court of the State of Colorado, in *Board of Comr's* v. *Rocky Mountain News Printing Co.* (1900) 61 Pac. 494, 496, said:

> "Everything which has an exchangeable value is property. The right of property includes the power to dispose of it according to the will of the owner. * * * (See Slaughter House Cases, 16 Wall, 127, 21 L. Ed. 394)."

The Court after quoting *Exchange Bank* v. *Hines*, 3 Ohio St. 1, and *Wynehamer* v. *People*, 13 N. Y. 378, 396, concluded as follows:

> "It will thus be seen that, in order to constitute property which is subject to ownership, as the terms are used in their broad sense, there *must exist not only the right of use and enjoyment, but the exclusive right to alienate or transfer.*" (Italics ours.)

To the same effect is the decision of the Supreme Court of Michigan in *People* v. *Common Council* (1888) 38 N. W. 470, wherein the Court said:

> "* * * property does not consist merely of the title and possession. It includes the right to make any legal use of it, and the right to pledge or mortgage it, or to sell and transfer it."

Similarly, the Michigan Courts said in *Kuhn* v. *Common Council* (1888) 70 Mich. 534:

> "* * * that property does not consist merely of the title and possession. It includes the right to make any legal use of it, and the right * * * to sell and transfer it."

Thus, it appears, there is unanimous agreement that property is the sum of the rights which it embraces and that one of these is the right of disposal in such manner as the owner may choose.

These statements of the court are simply the recognition of a fact which becomes apparent from the most cursory consideration of our present civilization. The surplus of goods produced by one over what the producer

may himself consume are without value unless they may be disposed of by the producer and transferred to someone else who may use them. If this was true at the time the concept of property was made definite by our early English commentators, it is a thousand times more true in this day of mass production and specialization, where one for months may only make many of the same minute parts of a great machine. Unless these parts may be disposed of they are without value. In our modern civilization it is impossible to conceive of property without the right of disposal as an inherent part thereof.

(c) The right of gift is an essential element of property. It inheres in each the right of disposal, the right of use, and the right of enjoyment.

If this be not so, what is property but the right of a person himself to consume the objects he may own. Stripped of the right of gift, we have but the bare husk.

Consider, if possible, one possessed of a substantial estate deprived of the right of gift. He may still use his estate to satisfy his own personal and selfish desires, but after that his use is limited to the mere exchange and accumulation of further riches. He must of necessity become a modern Midas. He may no longer invite his friends to share the enjoyment and the use of those objects which he possesses. After he has read some book which gave him enjoyment, he may not give that book to another, nor may he lend that book to his friend, for that would be the gift of the use of the book. Nor may he invite his friend to dine with him for he would be giving food and drink to his friend. Nor may he continue to support the Church, the Hospital, the Library, or other forms of charity, although this may be his chief pleasure in life, and the chief use and enjoyment of his property.

It is obvious that the right of gift inheres in the disposal of property. It is equally obvious that the right to use and to enjoy one's property comprehends the right

of gift. To say that one might use or enjoy one's property without this right of gift is obviously fallacious.

The right of gift as an element of property cannot be isolated and segregated as an element standing alone, but it is part and parcel of all of the other elements of property, and is one of the most deep rooted.

3. A tax upon the right of gift is a tax upon property and, therefore, direct.

If our premises are correct, the conclusion is inevitable that a tax on a gift is a direct tax, and we submit there is no escape from the conclusion.

It matters not, in the consideration of this question, that Congress saw fit to declare that certain gifts should be exempt from the tax which it sought to impose. We are not concerned with the graces and exemptions of the Statute. If Congress may tax all gifts over $50,000.00 it may tax all gifts of over 50 cents. In the first bill introduced in Congress the exemption was only $10,000.00 and after that was exhausted every gift of every sort, however small or insignificant, was subject to the tax. Our argument is addressed to the power of Congress to impose an excise upon gifts, not to the whims and caprices of its exemptions. This act necessarily draws in question the power of Congress to lay a tax on a fundamental element of property without apportionment as required by the Constitution.

To declare that Congress has that power, this court must disregard its earlier decisions, for, there can be no sound distinction between the taxation of the gift of property, the income of property or the possession, use or enjoyment of property.

Will this court say that the right of gift is not as valuable as the right to receive the income from property? We submit that in the eyes of most men, the right to use their property not only for themselves, but for their

friends and those dear to them, to promote those objects of charity in which they are most deeply concerned, is of greater value than the right to receive the income therefrom, if after they have received that income they may not use it in such manner as they desire, although such use may involve the gift thereof. Certainly Mr. Carnegie's life, after he had amassed a fortune, indicated that the right of gift was a superior factor in his possession thereof than the collection of income. To say to a man: "You may receive the income of your property, but after you have received it you may only use that income by fattening yourself with the consumption of that which it will purchase, or by accumulating it and turning it into added riches which you must similarly use only for yourself or for added accumulation", is to take from that man the greatest incentive he has to receive such income or to permit his property to produce income.

But the right of gift attaches not only to income but to capital. If a man be deprived of this right, then he is deprived of an element which gives property its value. Without the right to use, enjoy and dispose of property through gift or sharing with others, it has little value.

If Congress cannot lay a tax upon income without taxing property, then it may not impose a tax upon a gift without similarly taxing property. Both are indispensable parts thereof.

In the District Court below, the government practically conceded this, saying:

> "In the instant case, while economically the incidence of the present tax is upon the property itself, its legal incidence is upon the privilege of using, and whether this be called a tax upon consumption, potential use, or capacity for use, it is indirect in the constitutional sense."

Note the phrase "privilege of using". Our courts have recognized that the exercise of a privilege is a

proper subject of an excise or indirect tax, but we are not speaking of privileges but of a right which is a part of property itself.

It needs no argument to demonstrate that the general use of property may not be taxed without taxing property itself. The use of property cannot be transformed into the exercise of a privilege by the fiat of the government. This failure on the part of Congress to distinguish between rights and the exercise of a privilege is significant.

Even Judge Raymond, who in *Blodgett* v. *Holden* (1926) 11 Fed. (2d) 180, sustained the act in question, recognized that the right of gift is inherent in property and that if the tax were upon the right to give, it would be direct. As we shall hereafter show, he was in error in sustaining the tax upon the theory that there is a distinction between a tax upon the transfer by gift and a tax upon the right to give.

In *McNeir* v. *Anderson*, 16 Fed. (2nd) 970, the Circuit Court of Appeals took the bold position that Congress has the power to tax any use of property, although such use is an inherent incident of the right of property, so long as it is possible to use the property at all without incurring the tax.

The argument was concluded as follows:

> "It cannot be successfully contended that the right to give away property exhausts those interests which together constitute the rights of property, so as to amount to the taking of the property."
>
> "But the cases are clear that, where it is impossible to use property at all without incurring the tax, this is a direct tax upon property and unconstitutional. *Pollock* v. *The Farmers' Loan and Trust Company, supra; Dawson* v. *Kentucky Distilleries*, 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638."

As was said by Mr. Justice McKenna, in considering the position taken by the government in *Schwab* v. *Doyle, supra*, page 535:

> "In this there is much to allure an administrative officer. Indeed, its simplicity attracts any one. It removes puzzles from construction and perplexity * * *"

As above indicated, Judge Manton, writing the majority opinion of the court, indicated that he believed that this was the holding of this court to be derived from *Pollock* vs. *The Farmers' Loan and Trust Company.*

Let us consider whether the test which Judge Manton applied would have induced the determination of this court that an income tax is direct. Judge Manton's test is whether the use taxed "exhausts those interests which together constitute the rights of property, so as to amount to the taking of property."

Obviously, the use of property so as to produce income does not exhaust those elements which constitute the property. A man might use his real estate as his home; he might grow produce for his own use upon his land; he might hold his property unproductive until such time as he desired to sell it, and then use his capital for his own use and enjoyment. The investing of property so as to produce an income is only one of numerous uses which may be made of property.

Moreover, it has been recognized that this use of property by the investment thereof, so as to produce an income, is subject to regulation by the legislature of the various states. No one has contended that the usury statutes of the various states, limiting the amount of interest which a person may contract to receive, is a taking of his property or exhausts the rights of property.

The *Pollock* case is not authority for Judge Manton's proposition, but on the contrary is a denial of it. The

doctrine in that case was succinctly expressed by Mr. Justice Field, when he said:

> "It must be conceded that whatever affects any element that gives an article its value in the eye of the law affects the property itself."

As we have heretofore indicated, certainly in the eyes of many, the right of gift is as substantial an element of property as the right to invest it and to receive income therefrom, but it is not necessary to weigh these, and determine which element is of the greater value. It is sufficient to find that a tax has been laid upon an important element of property, for to tax such an element is to tax the property.

4. If taxes in form indirect extend beyond the limits within which indirect taxes may appropriately operate, they lose their character as indirect taxes and become direct.

The courts have not laid down any precise or express definition of indirect taxation as that term is used in the Constitution, nor have they deemed it expedient or necessary to define or definitely mark the scope of indirect taxation. Nevertheless, the decisions of the courts have recognized a sharp and definite distinction between direct and indirect taxes, in applying the constitutional provisions to tax legislation, and have reared a line of division discernible and definite. This line may be said to be a limitation, a boundary, and when the tax in question in operation falls beyond the line it ceases to be, whatever it may be called, within the scope and area of indirect taxation and becomes a direct tax.

A tax laid upon property is not indirect. This is fundamental. Laid upon a right inherent in property, or embraced in the concept of property, it is direct, and has failed to confine its operation in substance and effect within the constitutional area of indirect taxation.

No purpose would be served, even if it were practicable, to attempt to state the full scope of indirect taxes. If the tax be indirect in its incidence, and in its effect, it need only be uniform. If it be direct, whatever it may be called, and whatever its form, it must be apportioned. The courts have had for consideration, time after time, tax legislation, and the decisions relating thereto best illustrate and chart the limits and scope of how far taxes may go in reaching property or the person and still remain within the sphere of indirect taxation. We shall refer to the subjects which the courts have catalogued and stated to be within the field of indirect taxation. These fall within the following groups:

(*a*) The exercise of a privilege, in which may be included the privilege of doing business in a particular way permitted by statute or of dong some other act authorized by statute. For example:

The privilege of issuing bank notes. *Veazie Bank* v. *Fenno* (1869) 8 Wall. 513; *National Bank* v. *United States* (1879) 101 U. S. 1.

A stamp tax on memoranda or contracts of sale of certificates of stock, has been sustained as a tax on a particular transaction under the exercise of the privilege accorded by the laws in respect to corporations of disposing of property in the form of certificates. *Thomas* v. *United States* (1904) 192 U. S. 363.

On the privilege of corporations doing business. *Flint* v. *Stone Tracy Company* (1911), 220 U. S. 107.

(*b*) The doing of business or some other act in a particular way, this being also treated by the courts as the exercise of a privilege, for example, the tax upon each sale or agreement to sell any products or merchandise on an exchange or board of trade or other similar place. *Nicol* v. *Ames* (1898) 173 U. S. 509.

(*c*) Death duties on succession, inheritance and transfers of property at death, the succession of such prop-

erty being a privilege accorded by the sovereign power. *United States* v. *Perkins* (1896) 163 U. S. 625; *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust Company* v. *Eisner*, 256 U. S. 345.

(*d*) The manufacture of or dealing in certain articles. For example, the license tax on manufacturers of and dealers in oleomargarine. *McCray* v. *United States* (1904) 195 U. S. 27.

The tax on persons or corporations engaged in the business of refining sugar. *Spreckels Sugar Refining Company* v. *McClain* (1904) 192 U. S. 397.

In this group may also be included the tax on certain manufactured articles imposed intermediate the commencement of manufacture and before such articles have passed into the hands of the consumer. For example, the tax upon tobacco or snuff manufactured and sold. *Patton* v. *Brady* (1902) 184 U. S. 608.

In this group may also be included the tax upon gasoline sold or used by distributors, which Mr. Justice Pitney stated was an excise tax. *Bowman* v. *Continental Oil Company*, 256 U. S. 642.

(*e*) The special use of certain articles. For example, the tax upon the use *for pleasure* of foreign built yachts. *Billings* v. *United States* (1914) 232 U. S. 261.

In passing upon various of these taxes, the courts have been careful to pont out the limitations upon the power of indirect taxation, so that their decisions might not be misconstrued as extending the scope of such taxes beyond certain limitations. Thus in *Nicol* v. *Ames, supra*, while sustaining a tax upon the sale of products or merchandise at an exchange or board of trade, Mr. Justice Peckham was careful to point out that the tax would not be indirect, if laid upon all sales made in any place, saying, page 521:

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities

> there offered in accomplishing the sale *differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property.* It takes no notice of any kind of privilege or facility and the fact of a sale is alone regarded." (Italics ours.)

In *Thomas* v. *United States, supra,* Chief Justice Fuller expressed a similar limitation in sustaining the stamp tax on contracts of sale of certificates of stock. He said, page 371:

> "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property *in the form of certificates.*"

Similarly in *Flint* v. *Stone Tracy Company, supra,* in sustaining a special excise tax with respect to the carrying on or doing business of corporations, joint stock companies, or associations or insurance companies, Mr. Justice Day, delivering the opinion of the court said, page 152, "the requirement to pay such taxes involves the exercise of privileges", but was careful to add: "If business is not done in the manner prescribed in the statute, no tax is payable." He also said, page 150: "The difference between the acts [i. e. receiving income and doing business] is not merely nominal, but rests upon substantial differences between the *mere ownership of property* and the actual doing of business *in a certain way.*" (Italics ours.)

Compare the foregoing with those taxes which the courts have declared to be invalid because they extended beyond the limitations of indirect taxation, and were in effect direct taxes on property, and we find that Congress cannot lay a tax on the general use of an object of ownership, for it cannot so tax that element of use embraced in the right to receive the income of such object. Similarly, Congress cannot lay an indirect tax on the

general right to the possession of an object of ownership, for the right to possession is one of the elements of property in such object; nor may it lay such a tax upon the general disposition of such an object, for the right of disposition is also an element of property. It follows, therefore, as a corollary of the foregoing, that Congress may not lay a tax on gifts in general, for the right of gift is similarly an inherent element of property inhering in the right of use, enjoyment and disposition.

5. No sound distinction can be drawn between a tax on the transfer of property by gift and a tax on the right of gift or on the property given.

All gifts involve a transfer of property. This is axiomatic.

The act in question lays a tax on the transfer of all or any property by gift without regard to the manner in which the transfer is made or the means employed therefor, or the character or kind of property thus transferred.

The effect of the act, therefore, is to tax gifts generally. No attempt is made to select certain articles, the transfer of which by gift shall be subject to tax, nor to specify any special means, the employment of which shall be subject to a tax.

It follows that the right of gift may not be exercised without incurring a tax.

The decisions of the Supreme Court of the United States hold that a direct tax on property would result if Congress should declare:

(*a*) While the owner of an object has the subjective right of use thereof by reason of such ownership, nevertheless, he shall be subject to a tax if he exercises that right by objectively using that property in any manner or for any purpose. (This inevitably follows from the Pollock case, for the right to receive the income is only an incident of the right of use. See also the Mississippi

cases, involving a tax on the extraction of turpentine from trees, cited with approval in *Dawson* v. *Kentucky Distilleries, supra.*)

(*b*) Or if it should declare, while the owner of an article has the subjective right to the possession thereof, he shall, nevertheless, be subject to a tax if he exercises that right by objectively taking possession of the property. *Dawson* v. *Kentucky Distilleries, supra.*

(*c*) Or again, if it should declare that while the owners of property in general have the subjective right to sell it, they shall, nevertheless, be required to pay a tax if they exercise that right objectively by selling any or all of it without regard to the place of sale or the person by whom such property is sold, or the particular means employed of effecting the sale or transfer. *Nicoll* v. *Ames.*

The result of these decisions is that no distinction can be drawn between a tax on the subjective rights which are inherent in and make up property, and a tax on the objective exercise *generally* of those rights. If a tax is laid on the exercise of the right generally, then the tax in effect is upon that right. It then becomes a property tax and, therefore, direct, for the ownership of a right stripped of the power to exercise that right is without value. As stated by the New York Court of Appeals in *Wynehamer* v. *The People* (1856) 13 N. Y. 378, 398:

> "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power."

If the State should declare that hereafter no property might be transferred by gift, it would thereby abolish the right of gift. Such an act would have the same effect as one declaring directly that the right of gift is abol-

ished. The destruction of such a right would of course be the destruction or taking of property.

It follows that Congress may not lay an excise or indirect tax on the only available means of exercising the right of gift (i. e. by the transfer of property), for such a tax would directly affect the right of gift and would thus become a property tax.

In this connection there should be kept in mind the distinction between the inherent rights of property and privileges accorded by statute. It has been recognized by our courts that indirect taxes may be laid upon such privileges. There is also a clear distinction between the taxation of some particular means of exercising an inherent right and the taxation of all means of exercising it, or the exclusive means by which such right may be used.

As pointed out by Mr. Justice Peckham in *Nicol* v. *Ames*, *supra*, if a tax is laid upon all sales of property, it is a property tax, because the right of disposition is an inherent right of property. But Congress may lay an indirect tax on sales of property on an exchange or board of trade, for it is then within the power of the taxpayer to say, "I shall sell my property in some other manner, and shall not subject myself to the payment of the tax by selling it in the manner specified in the taxing act."

That the right of disposition of property by sale is an inherent attribute of property has very recently been recognized by this court in *Tyson & Bro.* v. *Banton*, 71 L. ed. 493. (Not yet reported in the official reporter.)

Not only the right to sell but the right to fix the price at which the property shall be sold, was there recognized as being inherent in property, Mr. Justice Sutherland saying (p. 495):

> "In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the

> owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, *State Freight Tax*, 15 Wall 232, 278, and, as such, within the protection of the due processes of law clauses of the fifth and fourteenth amendments."

If then, neither the State nor the Federal government may regulate the price for which goods shall be sold unless "the business or the property involved has become 'affected with a public interest' ", because to do so would be to deprive persons of property without due process of law, then it follows that neither the States nor the Federal government may restrict the gift of property without similarly depriving persons of property without due process of law. If the State of New York may not limit the price for which theater tickets may be sold by a broker, neither may the State provide that theater tickets shall not be transferred or disposed of without any compensation. And the reason why the State of New York may not do so is that the right to sell the ticket, and to fix the price for which it shall be sold, is property or an inherent attribute thereof, which from the constitutional point of view is the same thing.

This further observation of Mr. Justice Sutherland is also of interest. He said (p. 495):

> "The power to regulate property, services or business can be evoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars, it exists to regulate in others or in all."

Similarly it may be said that while Congress may excise the sale of specified manufactured articles before they reach the hands of the ultimate consumer, Congress may not, without laying direct taxes, require the payment of taxes on all sales of any or all property.

In *Blodgett* v. *Holden*, 11 Fed. (2d) 180, Judge Reymond, sitting as the District Court for the Western District of Michigan, reached the conclusion that an indirect tax might be laid upon the transfer of property by gift, although he recognized that if the tax were imposed "because of the general ownership of property," it would be a direct tax. He conceded that the "incidence of property, such as the rights to possess, sell, pledge, keep or enjoy," are "natural rights incident to ownership of property", and if the tax were imposed on such a right, it would be a direct tax.

In reaching his conclusion that the tax, being upon the transfer, is not upon property, he indulges in a somewhat extraordinary bit of reasoning. After stating that the tax is imposed only after the actual transfer, and that a gift can be consummated only by actual delivery, referring to the Act in question he says at page 186:

> "It levies a tax upon the transfer after the title and ownership of the donor has ceased by reason of a gift. Unless this distinction is kept clearly in view, the mind is constantly tempted to revert to the thought that the tax is upon the *right* to transfer by gift. If it were the latter, the tax could only be imposed during the actual ownership, because the right to transfer terminates by the transfer itself."

The law by its terms taxes the donor on the transfer of the property by gift, but as will be seen, Judge Raymond argues that the tax is not imposed until after the transfer has been completed. Therefore, he says the tax cannot be a direct tax upon the right of gift, because at the time the tax attaches, the donor no longer has the ownership of the property from which the right springs. The same argument might be applied to all dispositions of property either by sale, gift, distribution or relinquishment. If consistent, Judge Raymond would still argue that any tax imposed on the disposal must be indirect,

because the right of disposition in the owner had ceased by reason of its exercise. This, notwithstanding the fact that he recognized that such *right* of disposition is inherent in property and ownership and that the taxation of such *right* would be direct. But if the right of transfer has ceased before the tax attaches, then also has the transfer. The right does not cease until the transfer has been completed and has ceased.

If the donor have no other property, then the tax is made to apply to the property transferred. In such case it would clearly be, even upon Judge Raymond's hypothesis, upon the property itself.

However, the whole argument is fallacious, for it is based upon a false premise, i. e. that the tax does not attach until completion of the transfer.

If the tax be upon the transfer, then it must attach simultaneously, that is, from the moment the transfer starts until it is completed. During that whole time, the right of transfer must exist, that is to say, the right of transfer exists coincidently with the transfer itself and the tax attaches coincidently with the transfer.

Even if the argument were correct in fact, which it is not, it would be utterly unconvincing. Such fine-spun theories have no place in so practical a subject as taxation. As stated by Mr. Justice McReynolds in *Nichols* v. *Coolidge*, *supra*,

> "Taxes are very real things and statutes imposing them are estimated by practical results."

The actual practical result of the imposition of the tax under consideration is to place a burden upon, and directly restrict, the rights inherent in property to use, enjoy or dispose of an object of ownership in such manner as the owner thereof may wish, either by giving it to or sharing it with others.

The only support Judge Raymond could find for such a sheer-spun theory are certain remarks of Mr. Justice White in *Billings* v. *The United States, supra.* But Judge White was not speaking of the use of property in general, but the special use of a specific article. As stated in the opinion of Judge Hand in the District Court below that case

> "* * * is not in point, for the *use* of a yacht for pleasure was not only distinguished in the Supreme Court in the opinion of the Chief Justice from the sum total of the rights of disposition and ownership of the yacht, but it may perhaps also be said that many rights in ships have historically been treated as excisable."

The argument that a distinction can be drawn between the *right* of gift and the *transfer* of property by gift is a reversion to the view so frowned upon by the Supreme Court in the Pollock and other cases, that the form and not the substance should be considered in determining the character of a tax. The repeated expressions of our courts upon this subject make it clear that such a view no longer has any place in the consideration of tax legislation.

As stated by Mr. Justice Brandies, in *Dawson* v. *Kentucky Distilleries, supra*, page 292:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidence."

He later said, speaking of the tax there under consideration: "It cannot be made an occupation or license tax by calling it so."

Again, in *United States* v. *Phellis* (1921) 257 U. S. 156, 168, the court said:

> "We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder."

6. The gift tax cannot be supported as indirect by the application of any of those tests which are sometimes considered by the courts.

(a) The test of whether the tax is an absolute and unavoidable demand.

In dealing with the question of whether a given tax is or is not direct, the courts have often raised the query, does this tax represent an absolute and unavoidable demand upon the taxpayer. If that question must be answered in the affirmative, then the courts have declared the tax to be direct.

However, it does not necessarily follow that the converse of the proposition is correct. We subscribe to the proposition that if a tax represents an absolute and unavoidable demand, it is direct, but we doubt whether it may be said that if the tax is not an absolute and unavoidable demand it is indirect.

However, we believe that within the proper construction of the rule, the gift tax does constitute an absolute and unavoidable demand. To illustrate, it is now established that a tax upon the income from property either real or personal is a direct tax. It is an absolute and unavoidable demand on the taxpayer if he receives his income, that is, if he exercises the right to do so. However, he might refuse to receive the income and, therefore, escape the tax, but that is not the sense in which this phrase "absolute and unavoidable demand" is used.

Again it has been determined that the withdrawal of whiskey from a bonded warehouse, being a tax on the right to take possession of one's own property, is a direct tax. It is clear that the taxpayer may decline to take possession of his property and thereby avoid the payment of the tax.

It will be observed, however, in those instances that the only way in which the owner of the property might avoid the payment of the tax would be to refuse to exercise rights inherent in property.

Similarly it may be said that a man need not dispose of his property, that he need not give it away and, therefore, he may avoid the incurring of the gift tax, but that would be simply because he declined to exercise an inherent right of property. In each of these cases it appears that the exercise of the inherent right of property brings with it an absolute and unavoidable demand upon the taxpayer for the payment of the tax.

Again, we must draw the distinction between a tax imposed on the exercise of a right inherent in property and a tax upon the exercise of a privilege, or upon the doing of an act in the particular manner specified in the taxing act. It is not necessary for people to do business through the medium of a corporation. A tax upon a corporation, therefore, does not constitute an absolute and unavoidable demand, for the business may be done through another medium.

Similarly it is not necessary for the owner of merchandise to sell his goods on an exchange. He may sell his goods in some other place, and thus avoid the payment of a tax imposed upon the sale of goods at an exchange.

(b) There is no historical basis for declaring the tax in question to be an excise or indirect tax.

In considering various taxes which have been imposed by Congress, the courts have not infrequently referred to the historical antecedents for the purpose of determining whether certain taxes should be considered as direct or indirect, as those terms are used in the Constitution. Not infrequently such taxes have been sustained as indirect on the ground that similar taxes had been laid and had been treated and considered as excise taxes prior to the adoption of the Constitution.

Thus in *Patton* v. *Brady*, 184 U. S. 608, 618, in considering a tax laid upon tobacco and snuff manufactured and sold, Mr. Justice Brewer quoted with approval a

statement of one of the counsel, that "tobacco was supposed to be one of the subjects to which excise was applied in England when the Constitution was framed."

The historical background was also one of the chief grounds upon which the estate and inheritance taxes imposed by Congress have been sustained as being indirect taxes. In *New York Trust Company* v. *Eisner*, 256 U. S. 345, 349, Mr. Justice Holmes referred to this as being conclusive on the proposition that the estate tax should properly be regarded as indirect. An attempt was made to distinguish between a tax on the privilege of transmitting, and a tax on the privilege of receiving. He said:

> "But that matter also is disposed of by *Knowlton* v. *Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.' 178 U. S. 81-83."

And then epigrammatically he continued:

> *"Upon this point a page of history is worth a volume of logic."*

But there is no page of history to which the court may turn as justifying the action of Congress in imposing as indirect a tax on the gift of property. On the contrary, the pages of history show that at no time prior to the adoption of the act in question was a tax ever laid upon a gift *inter vivos* or the transfer of property by gift, either in this country or in any other English speaking country. This tax is a complete innovation, and we take the liberty of asserting was one of which the framers of our Constitution never conceived.

Therefore, insofar as an analogy because of the historical antecedents of a death duty is concerned, we may dismiss it from consideration, because a gift tax has no statutory or common law parents upon which to found its legitimacy.

Judge Learned Hand in the *McNair* v. *Anderson* case, in the court below indicated that the novelty of the tax did not affect its constitutionality. This we concede. But if the tax is novel, and cannot be supported merely by reason of its historical antecedents prior to the adoption of the Constitution, then it must be tested by its practical results and actual effect.

The gift tax does not fall within indirect taxes as that term is defined by economists.

In the brief of counsel in *Blodgett* v. *Holden*, the definitions of a number of economists are set out. In order to avoid repeating those definitions, we shall allude only to the conception of Adam Smith in his "Wealth of Nations", which was extant at the time of the adoption of the Constitution, in which he lays down as a test the shiftability of the tax, and distinguishes between direct and indirect taxes in that direct taxes are assessed on persons according to property or income, and indirect taxes on expenses or consumption, and Kickerman in *Systema de Disciplina Politica*, published in 1607, wrote that "indirect taxes are those which the State receives from artifices that it tolerates."

The tests of economists are consonant with the tests of the courts, and neither of them would uphold such a tax as the one here in question as being indirect.

8. The gift tax is not analogous to inheritance and estate taxes nor taxes on gifts intended to take effect in possession or enjoyment at or after the death of the donor, or made in contemplation of death, nor may it be defended as ancillary to the estate tax.

As heretofore pointed out, inheritance and estate taxes have been considered by the courts to be proper excise taxes on the ground that no one has the natural right to acquire property by will or descent and, therefore, when property is transmitted by will or descent, a privilege granted by the sovereign power is exercised which properly may be made the subject of an indirect tax. Moreover, as Mr. Justice Holmes pointed out in *New York Trust Company* v. *Eisner*, *supra*, historically they have been treated as excise or indirect taxes.

As stated by this court in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288, referring to the cases in which inheritance tax statutes have been sustained:

> "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."

The right of the Federal government to assess an excise tax upon the exercise of such a privilege was sustained in *Knowlton* v. *Moore*, 178 U. S. 41, and again, in *New York Trust Company* v. *Eisner*, *supra*, where Mr. Justice Holmes pointed out that, historically, such inheritance taxes have always been treated as excise or indirect taxes, and emphasized this as the most potent argument upon which the taxes should be upheld.

As stated by Chief Justice White, in *Knowlton* v. *Moore*, death is the generating source of all inheritance taxes, and this may be said of such taxes as have some

times been regarded as ancillary to inheritance tax statutes, i. e., taxes on gifts to take effect in possession or enjoyment at or after death, and taxes on gifts made in contemplation of death. In each case the central idea upon which the tax is based is the transmission of property at death, or the substantial equivalent thereof, the transfer of property by one in expectation of impending death. It may be said of gifts made in contemplation of death, that death is the generating source or cause, for, as the phrase "in contemplation of death" is interpreted, the statutes imposing such taxes are intended to reach only such gifts as are made because of the realization by the donor of impending death.

A tax upon a gift in contemplation of death, or upon a transfer to take effect in possession or enjoyment at or after death, is neither in theory nor reality a tax upon gifts *inter vivos*, but is a death tax based upon death as the generating source.

In *Keeney* v. *New York*, 222 U. S. 525, this court passed upon the propriety of a tax upon the transfer of property to take effect in possession or enjoyment upon the death of the donor. Mr. Justice Lamar distinguished between such transfers and other gifts of property, saying at page 533:

> "There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death, have frequently been classed with death duties, legacy and inheritance taxes."

While there may be grave doubt concerning the power of the Federal government to impose taxes upon gifts

made in contemplation of death, the theory upon which those taxes are imposed is to make effective the collection of inheritance taxes at death, and to prevent what otherwise might be a possible method of evasion.

The power of the Federal government to impose such taxes has never been directly passed upon by this court, but when the state statutes have been considered by the state courts the theory upon which they have been upheld, is that they are ancillary to the death taxes.

These statutes are always classed as inheritance tax statutes and have been sustained as such. The statute here in question has no relation to inheritance, or the transfer of property by death, or transfers made to evade such inheritance taxes, nor does it attempt to tax the transfer or creation of artificial estates in property. It purports to tax all gifts of property, without regard to the motive prompting the gift, or the occasion for it, or the manner in which the gift is consummated, or the character of the property which is the subject of the gift. It is a tax upon one of the essential elements of property, and bears none of the characteristics of those taxes generally classified as inheritance taxes which have been sustained by the courts.

Judge Learned Hand, in his concurring opinion in *McNeir* v. *Anderson*, in the Circuit Court, *supra*, page 974, referring to the changes in the estate tax law and to the gift tax, said:

> "we must assume, I think, that Congress supposed these to be in pari materia and progressively an execution of the main design."

However, it has been made clear by this court that neither the States nor the Federal Government may enact laws imposing taxes beyond their jurisdiction and claim, as a valid excuse, that the statutes are designed to assist in the collection of other taxes which may lawfully be assessed. Thus in *Schlesinger* v. *Wisconsin*, 270

U. S. 230, this court condemned the provisions of the Wisconsin inheritance tax law, which attempted to raise an irrebuttable presumption that any gift of a material part of the donor's estate, made within six years prior to his death, was made by the donor in contemplation of death, and thus subject to the inheritance tax. Mr. Justice McReynolds said, page 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes * * *. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

If as ancillary to inheritance taxes, as an aid to the collection thereof, and to prevent the evasion of such taxes, the State of Wisconsin may not raise an irrebuttable presumption that a gift, made within six years of the death of the donor, was made in contemplation of his death, then it would seem to follow inevitably that Congress may not impose a tax on all gifts at any time made by a donor, without regard to his motive or the object which the donor expects to achieve thereby, and defend such a tax on the claim that it is ancillary to the general design of the estate tax.

"Under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them." *Nichols* v. *Coolidge*, *supra*.

9. If the purpose and effect of the gift tax is to compel, subject to the imposition of a penalty tax, the retention intact of large estates, in order that neither the higher rates of the income tax nor the Federal Estate Tax may be avoided, then the gift tax must be considered a direct tax.

In *Blodgett* v. *Holden*, 11 Fed. (2d) 180, Judge Raymond argues that the gift tax is justified on the ground that it was imposed to prevent the avoidance of estate and income taxes. At page 186 he said that "the object of the gift tax undoubtedly was to make effective the provisions of the income tax and the estate tax in their application to large estates." Again he said, page 188: "its" (referring to the gift tax) "substantial object was to prevent the widespread evasion of the estate tax and the high surtaxes of the income tax law * * * "

Let us test this argument by the practical and natural effect of the tax, postulated upon this purpose. If the income tax as imposed upon income from property is a direct tax, and one may not avoid the income tax except upon the penalty of another tax imposed to prevent the avoidance thereof, then without regard to the election of the taxpayer, he must yield a portion of his property to the government. Either the income (a direct) tax will be imposed, or a gift tax with high graduated rates will be imposed. Upon whom or upon what? Either upon the property or the person. In either event, the tax is an unavoidable demand, is compulsorily demanded —and thus direct.

But, as Judge Raymond argues, the gift tax is not only a corollary of the income tax but is also a hand maid of the Federal estate tax. Thus in life or death the government will demand a contribution of the accumulated wealth. If one does not break up his wealth by giving it away, he shall pay the Federal death duty. If he does, he shall pay the gift tax. If he shall permit his property to produce, he shall be taxed at high income

tax rates, and also at his death upon his accumulated wealth. If it be not productive, nevertheless, the death duty shall be imposed. If he rebel at being driven upon the shores of the income or estate taxes, then he faces, upon the open seas, the storm and penalty of the gift tax.

Thus, without cavil or escape, the property is made subject to the tax. Unless the fortune be retained that death duties may be imposed, it, nevertheless, is taxed. Unless it be retained intact, so that the high income surtaxes may be applied to its earnings, it, nevertheless, is taxed. Could certainty be more certain or directness more direct.

Congress has, in effect, said to the owners of large wealth: We demand a portion of that wealth, and the more any has accumulated, the greater portion thereof we demand. We require that you shall retain your wealth intact, so that we may secure the large portion of the income which the Federal government will collect if your fortune is large. We are not satisfied to simply collect that portion that would be payable to the government as a tax upon the income, if it were distributed ratably among a large number of persons. We wish to secure the largest portion possible and, therefore, wish you to retain it and to collect the income therefrom. If you attempt to split up your fortune, you must then pay part of your capital to the Federal government. The amount of such payment will depend upon the amount that you attempt to distribute in any one year.

Moreover, you may not avoid so contributing a portion of your wealth to the Federal government by selling any part of it for less than its worth, for if you do so, the difference between the amount for which you sell it, and the amount which you receive in return, will be treated as a gift, and taxed as such. When you dispose of any of your property, you must be sure to receive the full value of it. If you make a mistake and lose part of

your fortune by reason thereof, you must pay a tax to the Federal government as if you had intended to make a gift of that portion which you so lose.

Judge Raymond states that this was the purpose of Congress. He cites the debates in Congress to support his view. We may assume that his statement reflects the position of the government. Can one conceive of a more direct and absolute demand on the part of the Federal government than the tax so sought to be imposed?

Moreover, whether this be viewed as an attempt on the part of Congress to prevent the splitting up of large fortunes, and the consequent diminution of the income tax which would be collected by reason thereof, or to prevent the splitting up of fortunes by persons not in contemplation of death, as that phrase is used in the statute, but to relieve the objects of their bounty from the burden of the estate tax should they postpone the transfer thereof until their death, it nevertheless represents an attempt on the part of Congress to regulate men in the disposition of their property. There is nothing illegal or improper in a person distributing his property while he is living among the objects of his bounty, and it matters not that he may be prompted to do so by reason of high income surtaxes or high inheritance taxes. He has a right to distribute his property as he will and when he will. The reason why Congress may have wished to thus regulate the disposition of property by owners of large wealth, and coerce them into retaining that wealth is not of importance. If that was the purpose of Congress, as asserted by the government, Congress was attempting something beyond its power, and the act must be condemned. Judge Learned Hand, in *McNeir* v. *Anderson*, apparently recognized that this was the purpose of Congress, and defended it, saying:

> "This is not to use the power of taxation for an ulterior purpose, as in the Child Labor Cases,

259 U. S. 20; 42 S. Ct. 449; 66 L. ed. 817, and the like."

The ultimate object which Congress sought to accomplish through regulating the disposition of property is not of importance. If it is conceded, that Congress, through the gift tax, did attempt to prevent persons from splitting up their accumulated wealth, and that seems to be the argument advanced by the government, then the act must be condemned as an attempt on the part of Congress to do that which is beyond its constitutional powers. In *The Child Labor Cases, Bailey* v. *Drexel Furniture Company*, (1922) 259 U. S. 20; *Hill* v. *Wallace*, (1922) 259 U. S. 44, and *Trusler* v. *Crooks*, (1926) 269 U. S. 475, the Supreme Court held that Congress may not regulate by means of taxation what it may not control by regulatory statutes. Certainly Congress has no power to regulate or control the dispositions of property by gift, nor has it any right to compel the owners of property to keep their estates intact. The object which Congress sought in thus attempting to regulate indirectly the disposition of large fortunes is not the determining factor. The attempt to regulate indirectly through taxation what it may not regulate directly is futile, and the act void.

POINT IV.

Even if the tax is held to be indirect it is, nevertheless, void because:

First: The statute is violative of the fifth amendment in that the attempted classification is capricious and unreasonable.

Second: It is not uniform throughout the United States as required by Article I, Section 8, of the Constitution.

Third: The law is so indefinite and uncertain in its operation that it may not be enforced.

The gift tax statute is discriminatory, arbitrary and capricious.

The statute provides that gifts up to $500. to any one individual are not subject to tax. A, if he give $1,000. each to fifty-one different people, is subject to tax. B, is exempt from such tax if he give $51,000. to one hundred and two different people by giving $500. to each. A, if he give one person $60,000. is subjected to a tax, and B may give $500. to a million people and be relieved of the tax. Such a classification is not based upon "some difference which bears a just and proper relation to the attempted classification." (See *Magoun* v. *Ill. Trust & Savings Bank* (1898), 170 U. S. 283, 42 L. Ed. 1037; also *Gulf Colo. & Santa Fe Ry. Co.* v. *Ellis* (1897) 165 U. S. 150, 41 L. Ed. 666).

The tax is not upon the donee. It is upon the donor. It undertakes to classify the gifts of the donor. To classify one gift of a million dollars by one donor, and to tax him, and to give another classification to another gift of one million dollars by another donor, and place him in another classification, does not come within the pur

view of the language used in the two cases above cited (the *Ellis* case and the *Magoun* case), or within the definition given by Mr. Justice Day, in *Southern Railway Co.* v. *Greene* (1910), 216 U. S. 400, 417, 54 L. Ed. 536, 541.

The Supreme Court upheld, in *Magoun* v. *Illinois Trust & Savings Bank* (1898), 170 U. S. 283, the graduated rates upon inheritance taxes. The tax there in question was a legacy tax, imposed upon the recipients of the property and measured by the amount received. But this is not the measurement of the gift tax in its attempted classification or progressive rates.

The statute in suit does not tax the donee on the amount he receives, with progressive rates upon that amount, but taxes the donor, and not upon the amount that he gives as a whole, during the year, but upon the aggregate amount of certain gifts, that is, as stated above, one man may give a million dollars and be free of the tax, another may give a million dollars and be subjected to a very large tax. This basis of classification is entirely different from the graduated rates of the present Federal Estate Tax act. Further than that, the classification or attempted classification, in the gift tax is similar to that that was held not tenable, and indicated, if tenable, to be unconstitutional by the United States Supreme Court in *Knowlton* v. *Moore*, 178 U. S. 41. In that case, the Government first contended that the statute was a tax upon the recipients of the property measured by the amount of the property left by the decedent. The Court held that this could not be done, and Mr. Justice White said, at page 76:

> "The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and

> separate thing. But this is equivalent to saying that the principal underlying the asserted interpretation is that the house of A, which is only worth $1000., may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundred fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated * * *. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other."

The court so construed the law, in order that the tax might be held constitutional, that the measure of the tax was the amount received, and not the value of the estate left by the decedent. The necessary inference from such a forced construction of the statute, is that a gift tax imposed upon the donor and measured not upon the total amount of his gifts, but the several amounts received by the certain beneficiaries, would come within the condemnation referred to by Mr. Justice White. He says, on page 77, relative to the tax on one's property, based upon the value of another's property, that

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

The gift tax is not uniform within the meaning of that term is used in the Constitution with relation to indirect taxes.

Article I, Section 8 of the Constitution of the United es provides that all duties, imposts and excises shall uniform throughout the United States. It has been eatedly stated by the courts that this requires geo- phical uniformity, that is, that if an excise tax is im- d upon the manufacture and sale of tobacco, it is aterial where the tobacco is manufactured or sold. tax is laid on persons manufacturing and selling cco in New York, this same tax must be imposed citizens doing the same act in Pennsylvania. We then say that the meaning of this section of the stitution is that all citizens of the United States, g the same act, must be uniformly taxed. We submit the act in question violates this provision of the stitution.

This tax act, for the first time, draws a distinction sidence, and taxes one citizen of the United States different basis than another citizen of the United es. It makes a classification based upon residence It is true that the Federal Estate Tax, as a tax an estate, is based upon residence of its previous r, the decedent. But the Federal Estate Tax is property located within the United States, and hav- situs here, passing by the laws of the several states. government has jurisdiction of the *res*. And all ees, devisees, heirs and distributees, regardless of ence, are treated alike. A citizen of the United es having property in Africa, or in South America, r real or personal, under the provisions of Section f the Revenue Act of 1924, would be subject to a tax its gift. This is the plain letter of the law. Yet government has no jurisdiction over the property. her citizen of the United States living in England, ng similar property, similarly located, would not be

subject to the tax. A non-resident citizen could take all of his personal property out of the United States, make a gift thereof, and thus free himself of the burden of the tax. A resident citizen, however, is treated differently. A citizen of the United States, living within the United States, is granted a $50,000 exemption—a citizen living without the United States, but yielding allegiance to the United States, and subject to all of its tax laws (See *United States* v. *Bennett* (1914), 232 U. S. 299, is not allowed the exemption.

Article I, Section 8 of the Constitution provides that all excises, imposts and duties must be uniform throughout the United States. When one speaks of the persons taxed, the reference is to the citizens of this country. The tax is not uniform when it permits the citizen, non-resident, to give away his property outside the United States free of the tax, and to impose the tax upon the citizen who resides here, regardless of the situs of the property donated by him.

Irrespective of the requirement of the Constitution that indirect taxes shall be uniformly laid, we also submit that the differentiation between citizens of the United States living in this country and abroad, is capricious and arbitrary, and violates the Fifth Amendment to the Constitution.

The law is so indefinite and uncertain in its operation that it cannot be enforced.

Section 320 provides:

> "If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by Sec-

tion 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

It is thus by the provision of this section of the law, that the duty is imposed upon the Treasury Department, that is, the United States, to investigate every sale or exchange of property occurring throughout the United States if made by a non-resident of property having a situs within the United States, and throughout the world, if made by a resident of the United States. In fact, the Government must have the value of the property exchanged or sold appraised by Government employes, or agents, wherever the location of the property, and under whatever conditions the property may be sold or exchanged, in order to determine whether the fair market value of that property was received in the exchange, or upon the sale. The Secretary of the Treasury, in his appearance before the Committee on Ways and Means of Congress on October 19, 1925, relative to the gift tax and particularly in respect to Section 320 of the law, said that:

> "Nothing illustrates as well the difficulty of preventing the avoidance of excessive taxation by statutory enactment as does this particular section of the law. When property is sold or exchanged, the difference between the value of the property and what is received is considered a gift. So if a seller makes a bad bargain, he must not only pay his loss, but he must pay a gift tax on his loss, and the more the loss the more tax he has to pay." (Reported in New York Times, Tuesday, October 20, 1925.)

The iniquity of this provision is that no man may know, except in some isolated articles of commerce, such as stock, grain or cotton sold upon the exchanges, the actual fair market value of the property which he elects

to barter, exchange or sell. Even upon the exchanges there may be during the day such a fluctuation of values as to render the giver or seller subject to an arbitrary determination of the government's official as to the fair market value of the property exchanged or sold during that day.

It cannot be the genius of this country to build in Washington some great centralized bureaucracy to pass upon every business transaction, to fix a value at which tradesmen and business people may sell or negotiate, and to hamper the easy and free flow of industry and commerce. A tax that has this resultant consequence, regardless of any specific provision of the Constitution prohibiting or granting it, is an interference with business, with property rights, with the right of man to treat with man, and is thus a violation of the powers reserved to the states by the 10th Amendment of the Constitution of the United States.

But the statute is also faulty in that the word "property" in Section 319, apparently includes the gift of money. In Section 320 the word "property" excludes the gift of money.

The statute also provides that the tax shall be paid upon the 15th day of such calendar year, that is, the calendar year for which the return is made. This is impossible. One cannot tell by the 15th day of March what one will do on the 31st day of December of the same year. In substance the statute fixes no definite time for the payment of the tax, or for reporting the gift. The statute says the 15th day of March, but does not say the 15th day of March of what year. If the language is strictly construed it would mean (see Section 323) the 15th day of March of the same year during which the gifts and contributions were made. This, of course, would be not only impossible but ridiculous.

Section 324 of the law says that

> "The tax imposed by Section 319 shall be paid by the donor on or before the 15th day of March, and shall be *assessed collected, and paid*, in the same manner, and subject, in so far as applicable, to the same provisions of the law as the tax imposed by Section 301." (Italics ours.)

Section 301 is a tax imposed against an executor or administrator, or the estate of a decedent, and is payable one year after death. A taxing statute must not only fix with some degree of certainty the things or acts subject to the tax, but must definitely fix the time of the payment, and the obligation for the payment. (See *U. S.* v. *Godel*, (1914) 232 U. S. 293, 58 L. Ed. 610).

A tax statute is inherently faulty and invalid that fixes no time of payment, or that leaves the time of payment so in doubt. If we read Section 323, in one sense, it means a tax must be paid on the 15th day of March of the year during which the contributions and gifts are made. Section 324, in making reference to Section 301, makes the time for payment of the gift tax all the more indefinite because the tax in Section 301 is collected from an executor of an estate, and is not payable until a year after the death of the donor. It may mean that the statute intended that the gift tax shall not be paid until the donor has died. If this be the construction, then the collector should have returned the tax already paid by the donor, because he is still alive.

We submit, therefore, that the classification is arbitrary and capricious, that it taxes one citizen of the United States differently from another citizen; that it permits one citizen to give away unlimited amounts of money, and another citizen to be subjected to the tax if he give away only a relatively small amount of money,

and compels the Federal Government, in order to properly enforce the whole of the Act, to inspect every business transaction wherein an exchange, or barter, or sale of property is made, at any time, whether by a merchant, a manufacturer, a tradesman, or an individual, in order to ascertain whether or not the fair market value of the property has been received on the exchange or sale. Any classification, or any tax law, whether national or state, that undertakes to regulate, in the most minute detail, the operation of all business transactions, and to permit a government official to be the deciding factor as to the propriety of that business negotiation or commercial enterprise, or as to the adequacy of consideration passing therefor, is inherently invalid, and should be declared null and void, because it is a capricious, whimsical and arbitrary interference with the rights of man, and the rights of property, a jurisdiction that is exclusively the states', and beyond the power of the Congress.

(See *Child Labor Tax case*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44; *U. S.* v. *Daugherty*, 269 U. S. 360; *Trusler* v. *Crooks* (1926) 269 U. S. 475.

No provision is made in the law for the assessment of the tax upon a gift in trust, such as that made by Mr McNeir. By the terms of the trust instrument, the property was given to a trustee to hold certain portions thereof, during the lives of certain persons, and with a remainder over in part upon the happening of certain contingencies to an educational institution, which is exempt from the tax under the letter of the law. Until the happening of the event which will determine whether or not any portion of the property so transferred will go to an exempt corporation, it is not practicable under the statute to say with definiteness whether or not the transfer made by George McNeir is or is not subject to the tax.

We endorse the observation of the President of the United States that "A Gift Tax is a further invasion of the rights of the citizen, both unusual in nature and of doubtful legality." (*) We go further and say that the tax is illegal.

The questions certified by the United States Circuit Court of Appeals for the Sixth Circuit should not be answered because the Gift Tax should be construed as not applying to gifts completed prior to the effective date of the Act, but if the said Gift Tax Statute be construed as applying to such gifts, then the said questions should be answered in the affirmative.

Respectfully submitted,

C. ALEXANDER CAPRON,
RUSSELL L. BRADFORD,
Amici Curiae.

(*) From statement concerning the Gift Tax by President Calvin Coolidge, made at the time of signing the Revenue Act of 1924, on June 2nd, 1924